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NOTES
ON THE
LAW OF
REAL PROPERTY.

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INDIANAPOLIS
THE BOBBS-MERRILL COMPANY
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REAL PROPERTY.

CHAPTER I.

THE CLASSES OF PROPERTY.

§ 1. **Ancient Names of Property.**—The terms *real* and *personal*, as applied to property, are of comparatively modern date, and the latter embraces at present many things which in early times were altogether unknown as the subjects of property. Let us first consider property in early times, and the ancient names which were used to designate the two great classes into which it has always been divided. In order to do this, we must transport ourselves in thought to England, and beneath the feudal system introduced by William the Conqueror in 1066.¹

¹ **FEUDALISM IN ENGLAND.**—The feudal relation, as it existed on the continent, was founded on the feudal tenure of land, the essence of which is the “holding of land by the grant of a lord, instead of holding it simply as a member of the commonwealth.” And the political principle was that “every tenant in chief of the Crown should make himself as nearly a sovereign prince as he could, and that his under-tenants should owe allegiance and obedience to their immediate lord only, and not to the royal or imperial head.” Thus it destroyed national unity, and weakened the central power. (Freeman, *Norman Conquest*, V., 246, 247.)

Modern writers agree that the elements of feudalism existed in England before the Norman Conquest. “There was no systematic feudalism, but the elements of feudalism were there in full vigor.” (Freeman, *Norman Conquest*, I., 62.) The relation of *lord and man* existed, but it was at first purely personal, and not necessarily connected with the holding of land. And so *military service* was required of the owners of land; but

Let us pay a visit to an Englishman or Norman of that period at his home in the country. We find him asserting his right to a certain number of acres of land, which he calls his own. It is his *landed* property, and he is a landed proprietor. But the *ground* is not all; he claims the dwelling he has erected upon it, the stable, the barn, and the other structures. In the fields there are horses and cattle,

this was a service due from the citizen to the state, and not from a vassal to the lord. (Taylor, *Origin and Growth of the English Constitution*, I., 133.) To create the true feudal relation, it was necessary to blend these two elements, so that the relation of lord and vassal should become that of *lord and tenant*; and so that the military service should be due from the *tenant* of land to the *lord* of whom he received it. This change was brought about after the Norman Conquest, and thus the *feudal system* was introduced into England. But it is said that it was not until the reign of William Rufus (1087-1100) that it grew into a methodical system of exactions and oppressions. This result is ascribed to Ranulf Flambard, justiciar to that monarch, in whose hands was the management of all the fiscal and judicial business. (Stubbs, *Constitutional History of England*, I., 339.) And Freeman says of Flambard, "Tendencies which had been at work before the Conquest, and to which the Conquest gave increased strength, were by him pushed to their logical results, and were worked into an harmonious system of oppression." (*Norman Conquest*, V., 253.)

But though the feudal tenure of land, with its onerous rents and services, was thus fastened on England, the political principle which weakened the Crown and strengthened the nobility never obtained a foot-hold there; for at the great Council of Salisbury (1086), a decree was passed that every freeman in the realm should take the oath of fealty to King William, "thus breaking in upon the feudal compact in its most essential attribute, the exclusive dependence of the vassal upon his lord." (2 Hallam, *Middle Ages*, 430.) For the oath was required, not only from the great land-owners, but from their tenants; and thereby William became sovereign of England, and not merely a feudal lord over a few feudal chiefs. Thus the "tendency of feudalism to a divided land, with a weak central government," was effectually checked in England. (Freeman, *Norman Conquest*, IV., 472; V., 246.)

growing crops, and farming utensils; in the dwelling, household and kitchen furniture; and in the barn, the garnered products of his fields. If you ask him, "What property do you possess?" he will claim as *his own* land and houses, cattle and furniture, growing and gathered crops. It is, he thinks, *all* his alike, and with his own he may do what he wills.

There is one difference, however, which he will readily admit. The land, the houses, the trees, and the growing grain are *fixed*, and must remain where they are; they are immovable. But the horses and cattle, farming implements and furniture, and the severed crops, he may take with him wherever he goes. They are *movable*. This division of property nature has made and common sense teaches, and it is the division of the civil law, and holds to this day in Louisiana.

Why, then, talk of *real* and *personal*? And why call his *land* a *tenement*, or dignify his humble dwelling with the high-sounding title of *hereditament*? Reason would never teach, and we must seek the answer elsewhere.

§ 2. **Tenements—Feudal System.**—Our landed proprietor lives in England towards the end of the eleventh century, some years after the Norman Conquest. He may be a Norman, and have come over with the Conqueror; or he may be a Saxon franklin, who has not been entirely dispossessed of his land to satisfy the rapacity of the Norman soldiery. However this may be, he is the occupier of the land, and so far better off, perhaps, than many others. But he is burdened with onerous exactions, on many occasions and for various purposes. He must attend his superior lord (perhaps the king) to the wars, though this is the least of his hardships. He must pay *aids* to ransom his lord from prison, to make his eldest son a knight, and to provide a dowry for his eldest daughter. While a *minor*, the lord claimed the right of *wardship*, and, as guardian, took all the profits of his land, making him no return; he claimed

also the *right to marry him* to whom he pleased, or to exact the value of the connection in money; if he would sell his land, he must pay a sum of money to the lord, a *fine* for the *right of alienation*; should he not have been a minor at his father's death, he had yet to pay a sum of money before the lord would allow him to take possession of his little patrimony. To this lord he has done *homage*, kneeling before him and professing to become *his man*, and to him he has sworn the oath of *fealty* (fidelity). Should he hold directly of the crown (*in capite*), he is still further burdened by additional exactions.

Should he inquire, "What does this mean?" he would learn that he is not the absolute owner of his land, but a *tenant*, though it should be in *fee-simple*; that he is "seised *as of fee*," and holds his land, not *allodially*, in his own right, but *feudally*, of a superior. If he is a Norman and holds under grant of the king, he is informed that his land was not given "freely and for nothing;" not as the reward of faithful service already performed, but on condition of *return* to be made hereafter, and *services* in future; that the crown is lord paramount of all the land in the kingdom; that all lands are held *mediately* or *immediately* of the crown that he holds his land as a vassal of a lord; and that the exactions of which he complains are the *rents* and *services* incident to the holding, or to the *tenure*. And the Saxon learns that the same rule applies to him—however it may have come about—and that he, too, is but a tenant of land, and to the tenure are annexed the rents and services.¹

¹ TENURE OF ENGLISH LAND.—"The great facts of William's reign did everything to strengthen the doctrine that land should be held of a lord. We have seen that, from the beginning, he dealt with all lay estates in England as land forfeited to the Crown, which the king granted out afresh, whether the grant was to the former owner or to some new grantee. The foreign soldier who received his reward in a grant of English land, held that land as a plain matter of fact, and without any legal subtleties, as a personal gift

If he asks, "Is not my land *mine*?" he is answered, "No; not the *land* absolutely; *that* belongs to the king; you have an *interest in the land*, which is all any subject *can* have; that interest, which may vary in degree, is called your *estate*. It may be for years, or for your life, or to you and your heirs, but still it is only an *estate*, a certain amount of *interest* in the land, and not *the land itself*." If the Saxon should inquire the origin and reason of such a rule, the reply of the Norman would be: "It is the FEUDAL SYSTEM. Your land is a *feud* or *fief*, as mine is. Mine was *really* given as the reward of military services, on condition of such and other services in future. Yours is *constructively* on the same foundation."

§ 3. **Lands.**—The Saxon begins to look about him; "And so you say my *land* is not my own; how as to those other things, my house and barn, for instance; and how as to my timber and growing crops; are these land also?" The reply is: "Yes, land is of far more importance than anything that can be affixed to it, *quidquid plantatur solo, solo cedit*. Land includes everything above, *usque ad cælum*; everything below, *usque ad orcum*. The houses were but timber and brick, but these being fixed to the soil belong to it, and so do your timber and growing crops, and the

from William. The Englishman who bought back his land, or received it back again as a loan, did not hold it as a gift in exactly the same sense as his Norman neighbor, but it was a royal grant by something more than a legal fiction. His land had been, if only for a moment, in the king's hands, to be dealt with as the king chose, and the king had chosen to give it back to him, rather than to keep it himself, or to give it to anybody else. The lawyer's doctrine, that all land must be a grant from the Crown, is thus accidentally an historical truth." (Freeman, *Norm. Conq.*, V., 248.) And he adds: "Let it once be established that land is held as a *fief* from the Crown, and the whole of the feudal incidents follow naturally."—*Ibid.* 253, 254, where this proposition is demonstrated.

ores and minerals under the ground. Should you sell your *land*, you would be considered as including all these."

§ 4. **Goods and Chattels.**—The Saxon glances over the fields, and sees his horses and cattle. "Are these my own?" he asks, "or have I in them, too, merely an estate?" "No," he is told, "they are yours absolutely. The feudal system cares nothing for such trifles; there are no degrees of interest in them, no estates; they are not the objects of tenure, are not holden by you of any one. But your lands and houses are *holden* of a superior. They are called *tenements* (*teneo*, to hold) for that very reason. These movables, household and kitchen furniture, cattle, etc., are *goods* and *chattels*, but we call your lands and houses *tenements*."¹

§ 5. **Incorporeal Tenements.**—So far we have noticed only such things as are *corporeal*, having body and substance, and which may be seen and handled. We have seen that land includes all that is affixed to it of a corporeal nature. But can nothing be annexed to land except what is visible and tangible? The Norman may be lord of a manor. As annexed to his land, by virtue of his ownership of it, he may have a right to present a priest to the parish church which he has built and endowed. Should he sell his manor, however, the right to present to the church would pass with it,

¹ NO TENURE OF CHATTELS.—"The feudal law and feudal tenures pertained only to land. It can be easily seen from the very nature of the relation between lord and vassal, and the peculiar character of the tenure, that personal property could not with any propriety be made the subject of these relations. Personal property is too transitory in its nature, too much consumed in the using, to be the sign of the permanent tie between the superior lord and his tenants. In addition to this consideration was the fact that movable property, in the flourishing times of the feudal system, formed but an insignificant part of the general wealth, and had attained none of the importance which it has reached in modern times." (Pomeroy, *Introduction to Municipal Law*, § 449. See *Ib.* § 417 to § 495, for an extended discussion of the feudal system.)

and belong to the new owner. This right, called an advowson, is incorporeal, but being annexed to the land, it is a *tenement*. Again, as incident to the land he owns, the proprietor may have a right to pasture his cattle on the land of his neighbor, a *right of common*; or to have a path over his neighbor's land, a *right of way*. So, too, as incident to his land in the hands of another, he may have a right to receive an annual *rent*. So we see there may be *incorporeal tenements* as well as those which are corporeal.¹

§ 6. **Hereditaments.**—The term *hereditaments* signifies anything which may be inherited; anything which on the death of the ancestor descends to his heir. By the law of England and the United States, when a man dies, his goods and chattels (now called *personal property*) do not belong at once to his children or next of kin; there are no heirs to inherit personalty; the title to it vests in the personal representative, the executor nominated in the will, or the administrator appointed by the court, whose duty it is to pay the debts, and then to divide the surplus, if any, among those entitled by law. But the title to land, real property, realty, is upon the ancestor's death intestate at once in the heir, or heirs, who are said to inherit it. Everything, then, which can descend to the heir is called hereditament. Nothing which goes to the administrator can be

¹ INCORPOREAL TENEMENTS.—It has been doubted whether, properly speaking, there are *incorporeal tenements*. (2 Washburn, Real Prop., 250.) Preston says: "Perhaps a rent or a common is not a tenement, agreeable to the strict rules of the law of tenures; it is a tenement, however, in reputation; it is a tenement within the meaning of several statutes, particularly the statute (*de donis*) of intails." (Preston on Estates, p. 8.) Lord Coke, however, is express that "tenement is a large word to pass, not only lands and other inheritances which are holden, but also offices, rents, profits, a *prendre* out of lands, and the like, wherein a man hath any frank tenement, and whereof he is seised *ut de libero tenemento*."—(1 Thomas's Coke, 219. See to same effect, *Van Rensselaer v. Read*. 26 N. Y., 558, 566.)

more than a chattel. Like tenements, hereditaments are both corporeal and incorporeal. Hereditaments are usually also tenements, but not necessarily so. Thus, a chattel which by special custom goes to the heir with the land (heirloom) is for that reason a hereditament; but it is not a tenement, for there is no tenure of chattels. For the learning as to tenements and hereditaments, see Preston on Estates, pp. 6-14.¹

§ 7. **Real and Personal Property.**—Let us now consider the origin of the terms *real* and *personal* as applied to property. Actions for the recovery of land had, long before the use of the word as to property, been called *real* actions, because, the land being immovable and indestructible, the identical land, the very thing (*res*), could be recovered. The action

¹ TENEMENTS, ETC., MEANING OF.—As used with reference to *corporeal* property, the words *lands*, *tenements* and *hereditaments*, denote things real, the *subjects* of ownership, and not the *estate* or *interest* which the tenant may have in such subjects. Thus, one may hold a *tenement* for a *term of years*, and a devise at common law of the testator's *hereditaments* conferred on estate *for life* only. See *Moor v. Denn*, 2 Bos. & Pul. 247, where it is said of the word hereditament occurring in a will: "The settled sense of that word is to denote such things as may be the subject-matter of inheritance, but not the inheritance itself; and [it] cannot, therefore, by its own intrinsic force, enlarge an estate *prima facie* a life estate into a fee." (See 3 Jarman on Wills, 44; 2 Redfield on Wills, 330; 1 Sharswood & Budd's Leading Cases on Real Property, 60.)

But it would seem that as to *incorporeal* realty the idea of tenement or hereditament is inseparable from the degree of interest. As to land, we cannot conceive of it without the existence of the fee-simple and freehold in some one, though the possessor may have a mere chattel interest, as a tenant for years. Such land is therefore a tenement or hereditament with reference to the *higher* estate subsisting somewhere, and is therefore *capable* of being inherited, and *may* be holden. But as to incorporeal rights issuing out of land, or exercisable within it, if the owner of the right has a term of years only therein, *non constat*, that any higher estate exists anywhere, and therefore *tenure* and *in-*

to recover a chattel was not called *real*, because the action was for damages, and not for the thing itself. Indeed, except in the action of *replevin*, there was no way at common law to compel the defendant to restore the very thing if he chose to withhold it. Hence the action was *in personam*, to obtain in damages a useful vindication (*vindicatio utilis*), and not *in rem*, to recover the specific *res* (*vindicatio rei*). It followed that, though lands and chattels were equally real, land was called *real*, because the action to recover it was *in rem*, and chattels were called *personal*, because the action as to them was *in personam*. This is the view taken by Williams, who rejects Blackstone's explanation, that things personal "may attend the owner's person wherever he thinks proper to go," remarking that goods and chattels were not usually called things personal until they had become too numerous and important to attend the person of their owners. He adds that the words real and personal, as applied to property, were not in common use until the beginning of the eighteenth century, after the statute of 12 Charles II., ch. 24 (1660), had given a final blow to the feudal system by turning the military tenure by knight service into tenure by free and common socage.¹ (Williams, R. P., p. 6.)

§ 8. Estate in Lands, etc.—We have now completed our consideration of things real; *i. e.*, lands, tenements and hereditaments, or, to use the modern term, real property.

heritance cannot be predicated of it. (See Cooley's Blackstone, Book II., p. 14, n. 1; 1 Tho. Co. (219); Preston on Estates, 12.)

¹ NO TENURE IN VIRGINIA.—Though the statute of 12 Charles II., ch. 24 (1660), changed knight service into socage, it did not abolish tenure, and it is still a received maxim in English law that "all lands are holden," except those belonging to the crown. In Virginia, the letters patent of James I. granted the land "to be holden of us, our heirs and successors, as of our manor of East Greenwich, in the county of Kent, in free and common socage only," etc. (1 Hen. Stat., 66 and 88.) But there is now no tenure of land in Virginia, it having been enacted in 1779, "That the

Let us next consider *estates* in things real. And these are, (1), Estates real; and (2), Estates personal. For there may be personal *estate* in a real thing, though there cannot be real estate in a thing personal.

§ 2. **Real Estate.**—According to Blackstone (2 Bl. Com. 103), an *estate* in lands, tenements and hereditaments, signifies such *interest* as the tenant has therein, the word signifying the condition, or circumstance, in which the owner stands with regard to his *property*. Estates in land are divided into estates of freehold, and estates not of freehold. And an estate of *freehold* under the feudal rules answers to *real* estate, and estates *less* than freehold are regarded as *personal* estate only.

A freehold estate in lands, tenements and hereditaments, is an estate for the tenant's own life, or for the life of another (*pur autre vie*), or any larger estate; for example, an estate-tail, or a fee-simple. And the law considers any estate to be for life, if by possibility it may endure so long. For this reason an estate to a widow during her widowhood

reservation of royal mines, of quit rents, and all other reservations and conditions in the patents or grants of land from Great Britain under the former government shall be, and are, hereby declared null and void, and that all lands thereby respectively granted shall be held in absolute and unconditional property to all intents and purposes whatsoever, in like manner with the lands hereinafter to be granted by this commonwealth." (10 Hen. Stat. pp. 64, 65.) This makes the ownership of land in Virginia *allodial*, and the same is true in the other States of the Union. "So that fidelity to the State is now the only fealty that any man owes for his lands; his only lord paramount is the people of the State where such lands are situated." (Taylor, *Landlord and Tenant*, § 11; Pomeroy, *Municipal Law*, § 464.) And Judge Cooley says: "In America, as in England, the sovereignty is recognized as the source of all title, and the State succeeds thereto in default of heirs; but this right is not peculiar to the feudal system; neither is the eminent domain, which is sometimes referred to as a remaining incident of the feudal system." (2 Bl. Com. (102), n. 7.)

is a life estate. We may, therefore, define a freehold as such an estate in a real thing as is of *indefinite duration, and by possibility may last for life*. And this is also the definition of *real estate*. Under this definition, estates at will and by sufferance are to be excepted, as they are certainly not estates of freehold, being scarcely regarded, because of their precarious character, as estates at all; and estates by statute-merchant, statute-staple and *elegit*, are also to be excepted because they are merely securities for debts; and, as they pass with the debts to the personal representatives, they are treated as personal estates. (2 Bl. Com. 162.) A mortgage debt is treated as an interest in land of a personal nature in a court of equity, but at law the estate of a mortgagee in fee-simple is real estate, and passes to the mortgagee's heirs. (Williams Real Prop. 421.)

We thus see that the proper and technical meaning of "real estate" is a certain degree and quantity of interest in real property; but the words are sometimes used to describe *land itself*, as when one says, "my estate at A." And this popular meaning may be given to "real estate," even when the words occur in a statute, if the context clearly shows this to be the legislative intent. See *Troth v. Robertson*, 78 Va., 46, 55.

§ 10. **Personal Estates in Land; or Chattels Real.**—The most important estate under this head is a *term of years* in land, or as it is commonly called, a *lease*.¹ Is this real or personal estate? If for one hundred years, will it on the death of the owner (tenant, lessee) go to his administrator or to his heir? Such a term is personal estate, although it is an interest in land; but as it *savors of land*, it is therefore, says Lord Coke, called a *chattel-real*. (3 Tho. Coke, 293.)

¹ For other examples of chattels real, see 2 Bl. Com. 386. These are not in existence in the United States, except the estate by the writ of *elegit*, and that has been abolished in Virginia. (Code, § 3581.)

The reason why a term of years is not real estate is of feudal origin. We have seen that freehold and real estate are the same degree of interest in land. But an estate for life, when the Conqueror parcelled out the land of England to his chiefs, was the smallest degree of interest a *freeman* would consent to *hold*. So a life estate was the lowest *freehold* estate, as we have seen. And when terms of years came to be recognized as estates, they were considered inferior to estates of freehold, and the doctrine was established that a freehold is larger in contemplation of land than a term of years, however long. (Williams, R. P., §13.)

Again, a freehold estate required a peculiar ceremonial in its bestowal, called *livery of seisin*; i. e., delivery of the seisin or feudal possession. This was the feudal investiture. The lord went with the vassal upon the land and gave him a twig or turf, in token of the delivery of the possession, in the presence of the countryside as witnesses. A lease, not being a feudal grant, required no such procedure. It would pass by a mere verbal agreement, completed by the tenant's going alone and entering upon the land. Hence Blackstone's definition of a freehold estate as one that requires *livery of seisin*. (2 Bl. Com., ch. 7.) But a lease was not regarded as really giving the lessee the ownership of the land, even for the term. The lessor did not part with the *seisin*; there was no *livery of seisin*. It was a mere contract between the lessor and the lessee, by which the latter became steward or bailiff of the former, holding the land at an annual valuation. A lease is to this day in England, and generally in the United States, a mere chattel, no matter what its duration.¹ Williams, R. P. 8; Taylor, Landl. and Ten. § 14, n. 2.

¹ The Code of Virginia (§ 5, cl. 10) gives these statutory definitions ("unless such construction would be inconsistent with the manifest intention of the legislature"):

"The word 'land' or 'lands,' and the words 'real estate,' shall be construed to include lands, tenements and hereditaments, and all

§ 11. **Timber, Grass, and Crops.**—We have now seen that personal property passes to the administrator of the deceased owner, and that there may be a personal estate in land (chattel real) which also goes to the administrator, whereas all other estates in land which do not cease with the owner's death (estates of inheritance) descend to the heir. And we have seen that if the owner of land sells it, all the timber and growing crops pass with the land to the grantee. And the same is true on a *devise* of land; the devisee is entitled to timber, fruit, grass, wheat, corn, tobacco, etc., the gift of the land importing a gift of all that is affixed to it. *West v. Moore*, 8 East. 339; *Bradner v. Faulkner*, 34 N. Y. 347; 1 Lomax Ex'ors, 420; 3 Redfield on Wills, 154.

But when the owner of land dies intestate, and it descends to the heir, a distinction is made between such unsevered vegetable products as are raised annually by cultivation and labor (*fructus industriales*), and such as are the natural produce of the ground (*fructus naturales*). The former class, called *emblements*, are considered personalty, and pass to the administrator, while the latter class, those not emblements, are regarded as part of the realty, and go with the land to the heir. Emblements may be defined as the annual results of agricultural labor; *i. e.*, the crops which repay the labor bestowed upon them within the year, and they belong to the administrator, because the personal estate is expended in their production, and should therefore be increased by their value. Accordingly, crops of corn, wheat, and other cereals, potatoes and other root crops, cotton, hemp, flax, etc., are emblements, and go to the administrator; while timber, fruit trees, fruit, grass, clover, etc., are not emblements, and pass to the heir. (3 Redf., Wills, 150–155; 4 Lead. Cases, Real Prop., 517; Tied. Real Prop., § 71, note 4.)

rights thereto and interests therein, other than a chattel interest; and the words 'personal estate' shall include chattels real, and such other estate as upon the death of the owner intestate would devolve upon his personal representative."

But on a *devise* of land, as we have seen, the devisee is entitled to all unsevered vegetable products, those which are emblements, as well as those which are not.¹ *Dennet v. Hopkinson*, 63 Me. 350 (18 Am. R. 227).

§ 12. **Mineral Rights.**—We have seen that the ownership of land usually extends *usque ad orbem*; i. e., to the centre of the earth. But the owner of land may divide by a horizontal plane, granting the surface freehold, while he retains the substratum; or granting the substratum, while he retains the surface. This is very common in Pennsylvania and other mining regions, the surface right being in one man, and the mineral right in another. It then becomes important to ascertain the nature of the mineral right, whether it is to be regarded as corporeal or incorporeal; for if incorporeal, it can pass on a grant of the land to which it is appurtenant, as we have seen with reference to easements and profits *à prendre* annexed to land; but if corporeal, the doctrine is that land cannot be appurtenant to land, and if not *parcel* thereof, requires a separate conveyance. Again if the right be incorporeal, it is said to be indivisible; but if corporeal, it may be conveyed in parts like any other land. (25 Am. D. 582; 72 *Id.* 760.)

¹ In *Shelton v. Shelton*, 1 Wash. (Va.) 53, it was held that, under the statute then in force, a devise of land, where the testator died after March 1, would not pass to the devisee the crops unsevered at the testator's death, unless such *intent* was manifested by the will. And see *Fleming v. Bolling*, 3 Call. 75, 82, explaining *Shelton v. Shelton* as a case under the statute, and admitting the common law to have been otherwise. And see 1 Lom. Ex. 421, as to the effect of the Code of 1849, ch. 139, § 2. But however the law may have been formerly, it is believed that now in Virginia a devise of land will carry the emblements to the devisee, unless a contrary intention is expressed in the will. For the Code of 1887, § 2806, declares that "in all cases the right to emblements shall be as at common law;" and by the common law a devise of land to A gave him the emblements. And see *Bradner v. Faulkner*, 34 N. Y. 347, which is *e contra* to *Shelton v. Shelton* on the construction of a very similar statute.

It is now settled that, if the grant or reservation of the right to dig minerals is *exclusive and unlimited in all respects*, it will be regarded as carrying the entire ownership of the ore in place beneath the ground; that this exclusive and unlimited right to take minerals is equivalent to a grant or reservation of the minerals themselves, and constitutes a *corporeal* hereditament, not a mere privilege, or profit à *prendre*; but on the other hand, if the right to take the minerals be not exclusive, so that the grantor may dig as well as the grantee, or if it be *restricted* to a specified quantity or to certain purposes, it is an incorporeal hereditament, because it is not a grant or reservation of the *entire* ownership of the ore beneath the grantor's land. See *Caldwell v. Fulton*, 31 Pa. St. 475 (72 Am. Dec. 760), where the cases are reviewed. *McClintock v. Bryden*, 5 Cal. 97 (63 Am. Dec. 87, and monographic note at 101); *R. Co. v. Trimble*, 10 Wall. 367; *Reynolds v. Cook*, 83 Va. 817 (5 Am. St. R. 317); *Lee v. Bumgardner*, 86 Va. 315; *Barksdale v. Parker*, Va. Ct. App., Dec. 1890; 15 Va. L. J. 133); *List v. Cotts*, 4 W. Va. 543; *Wililams v. Gibson*, 84 Ala. 228 (5 Am. St. R. 368.)¹

§ 13. **Incorporeal Personality.**—The division of property into corporeal and incorporeal applies as well to personality

¹ LICENSE TO TAKE MINERALS.—In *Hodgson v. Perkins*, 84 Va. 706, it is held that an indenture between a landowner and certain skilled miners, giving them the privilege of digging for gold, etc., on the former's land, and to hold the same for such purpose, and none other, so long as they may deem it worth while to search for gold, etc., creates *no estate* in the land, corporeal or incorporeal, but only an unassignable license. See, too, *Barksdale v. Hairston*, 81 Va. 764, where a mining agreement was held a mere license, and revocable at the will of the licensor, so long as it remained executory. See also *Hazleton v. Putnam*, 3 Pinney (Wis.) 107 (54 Am. D. 158); *Bush v. Sullivan*, 3 G. Greene (Iowa), 334 (54 Am. D. 506); *Riddle v. Brown*, 20 Ala. 412 (56 Am. D. 202), for the distinction between a license and an incorporeal hereditament.

as to realty. Thus goods and chattels in possession are corporeal, while bonds, notes, and other money rights lying in suit, called *choses in action*, are incorporeal. As to stock in jointstock companies, it is in its nature incorporeal personal property, even in the case of railroad and other internal improvement companies whose operations concern land. The reason is that the land is vested in the ideal person, the corporation, and is realty; but the stock, which is a right to share in the dividends, is in the nature of a *chose in action*, and in the hands of the stockholders is personalty.¹ Angell & Ames, Corp., § 557.

§ 14. Houses Built by One Man on the Land of Another.—

We have seen that a house erected on land becomes real property, as part of the land. And this rule applies at common law even when A erects a house on B's land under a mistake as to the title; the house still becomes a part of the soil and the property of B. (4 Leading Cases, Real Prop., 518.) But it is otherwise where A erects a house on B's land with B's permission, and with the understanding, express or implied, that A may remove it at pleasure. The house then remains the property of A, and is considered personal property. *Russell v. Richards*, 11 Me., 371 (26 Am. D., 532); *Curtis v. Hoyt*, 19 Conn., 154 (48 Am. D., 149); *Dame v. Dame*, 38 N. H., 429 (75 Am. D., 195); *Andrews v. Auditor*, 28 Gratt. 115.

Questions as to the character of annexations to land also

¹ Whether the stock of a corporation is realty or personalty is sometimes settled by its charter. Thus the stock of the old "James River Company" (chartered 1784) was declared to be real estate. (11 Hen. Stat., p. 455; Revised Code, 1802, p. 442.) So of the stock of the "Dismal Swamp Canal Company," chartered in 1787. (12 Hen. Stat., 484.) So in England as to New River shares. (*Drybutter v. Bartholomew*, 2 P. Wms., 127.) In Virginia it is enacted: "Shares of stock shall be deemed personal estate, and as such shall pass to the personal representative or assignee of the stockholder." (Code, § 1125.)

arise on a conveyance or mortgage thereof; and, on the death of the owner, between the heir and administrator; and likewise when the annexations are by a life tenant or tenant for years. These are reserved for the next chapter, to be considered under the head of *Fixtures*.

CHAPTER II.

FIXTURES.

§ 15. **Definition.**—By the term *fixtures* are denoted those articles which were chattels, but which, by being physically annexed or affixed to real estate, become a part of, and accessory to, the freehold, and the property of the owner of the land. Hill on Fixtures, § 1; Taylor on Landl. and Tenant, § 544; 1 Wash. on Real Prop. (10); 3 Redf. Wills, 156; 2 Devlin on Deeds, § 1191, and n. 2; *Teaff v. Hewitt*, 1 Ohio St. 511 (59 Am. D. 634); *Green v. Phillips*, 26 Gratt. 752-'9 (21 Am. R. 323).

Fixtures are sometimes defined in a manner precisely the reverse of the above, viz., as those chattels, which, although physically annexed to real estate, do *not* become a part of, and accessory to, the freehold, but remain chattels, and the personal property of the tenant, or other person by whom they are so annexed. (2 Min. Inst. (3rd. ed.) 604; *Sheen v. Rickie*, 5 M. & W. 175, *per* Parke, B.; Amos & Ferard, Fixtures, 2.)

It has been proposed to avoid this conflict by defining fixtures as "anything annexed to the freehold," without reference to the question whether realty or personalty, whether removable or not removable. (2 Sm. L. C. 187, note to *Elwes v. Maw*; 1 Schouler on Pers. Prop. 137; Wms. on Pers. Prop. 13.)

It is thought best, however, to adopt the definition first given, as it is less liable to confuse than the others, and is recognized by the greater number of decisions.¹

¹ "The term *fixture*, in the ordinary signification, is expressive of the act of annexation, and denotes the change which has occurred in the nature and legal incidents of the property; and it

§ 16. **Classification.**—Questions as to fixtures may arise, as was explained by Lord Ellenborough in *Elwes v. Maw*, 3 East. 38, between—

1. Heir and executor.
2. Executor of a tenant for life and the remainderman or reversioner.

3. Landlord and tenant.

Let us consider these in their order.

I. Fixtures between the Heir and the Executor.

§ 17. **Introductory.**—The ancient common law, regarding land as of far more consequence than any chattel which could be affixed to it, always considered everything attached to land as part of the land itself. The property in the thing must accede to that in the land. As between heir and executor, this rule benefited the heir, who has been a great favorite of the common law from the earliest times. And while the ancient strictness of the rule as to fixtures has been greatly relaxed in other cases, and especially as between landlord and tenant, yet between heir and executor there has been but little change. And it seems reasonable that whatever is once annexed to the freehold, for the benefit of the inheritance, and for purposes connected with its use and enjoyment, should go with the inheritance to the heir, rather than that the inheritance should be dismembered and disfigured in order to increase the personal estate.

The rule as laid down in Sheppard's Touchstone, p. 470, is that the executor shall not have the "incidents of a house," as windows, doors, wainscot, and the like; that they shall not be "divided and sold from the house." "But if the

appears to be not only appropriate but necessary to distinguish this class of property from movable property possessing the nature and incidents of chattels. It is in this sense that the term is used in far the greater part of the adjudicated cases." (*Teaff v. Hewitt*, *supra*.)

glass be from the windows, or there be wainscot loose, or doors more than are used that are not hanging, or the like, these things shall go to the executor or administrator." See *Peck v. Batchelder*, 40 Vt., 233; 94 Am. D. 392.

From the above extract, and also from the definition of fixtures, it will be seen that *annexation to the freehold* is considered necessary. It has been said that to constitute annexation the chattel should be let into the soil, or cemented to, or otherwise united with, something previously let into or forming part of the soil; and that simply laying a thing upon the land will not be sufficient. And that if a chattel is kept in place merely by the force of gravitation, so that the only impediment to its removal is its own weight, it is not a fixture. Thus a barn placed on blocks of timber lying upon the ground, but not let in, is not a fixture. *Culling v. Tuffnall*, Bull. N. P. 34. See 3 Redf. Wills, 157. So a gin-stand not attached to the soil except by its own weight, though it may be used for the purposes of the farm, is not a part of the realty, *Cole v. Roach*, 37 Texas, 412; 2 Dev. Deeds, § 1205. Nor is a saw-mill built upon timbers lying on the surface of the ground. *Brown v. Little*, 6 Nev. 244. And in *Carlin v. Ritter*, 68 Md. 478 (6 Am. St. R. 467), it is held that a wooden structure or a building merely resting by its own weight on flat stones laid upon the surface of the ground, and having no other foundation, is not a fixture. On the other hand, in *Snedeker v. Warring*, 12 N. Y. 170, it was held that a colossal statue resting by its own weight on a permanent pedestal, was a fixture. The court said: "A thing may be as firmly affixed to the land by gravitation as by clamps or cement. Its character may depend much upon the object of its erection. And in Massachusetts, a cistern sitting against the wall was held to be a fixture. *Bainway v. Cobb*, 99 Mass. 457. And in *Cole v. Roach*, 37 Texas, 412, it is said: "Where a cistern has been placed against the house for the purpose of supplying the inmates with

water, and has been used and depended upon for that purpose, it should be considered as part of the realty as much as the key to the door, or the fence around the yard or field." See 2 Dev. Deeds, § 1205, n. 2.

In regard also to the *method* of annexation, we may observe that some things which come within the rule of fixtures are very slightly annexed to the freehold. Thus the doors, windows, shutters, the locks, bolts and bars of a house can generally be removed at any time without the slightest damage to the freehold; and yet these are fixtures. Heavy articles, on the other hand, like mirrors,¹ pictures, and wardrobes, though strongly fastened to the wall by screws, are mere chattels. "The difficulty is somewhat increased," says Chief Justice Shaw, "when the question arises with respect to a mill or manufactory, when the parts are often so arranged and adapted, so ingeniously combined, as to be occasionally connected or disengaged, as the objects to be accomplished may require." *Winslow v. Ins. Co.*, 4 Met. 314 (38 Am. D. 368); 1 Schoul. P. P. 139.

¹ In *McKeage v. Ins. Co.*, 81 N. Y., 38 (37 Am. R. 471), it is said: "The mirrors were not set in the walls, but were put up after the house had been built, being supported in their places by hooks or supports, some of which were fastened by screws to the woodwork, and others driven into the walls, and were capable of being easily detached from these supports, without interfering with or injuring the walls. All these articles were in their nature mere furniture, and therefore chattels, and not appurtenances to the building. . . . They no more constitute part of the realty than would pictures supported by fastenings driven into the wall."

But it does not follow that mirrors may not be so fitted to a house as to become fixtures. Thus in *Ward v. Kilpatrick*, 85 N. Y. 413 (39 Am. R. 674), mirror frames were held to be part of the realty. The court said: "The mirror frames in the present case were actually annexed to the realty. They were so annexed during the process of building, and as a part of that process. They were not brought as furniture into the completed house, but themselves formed part of such completion. Those in the hall

§ 18. **The Criterion of a Fixture.**—The difficulties growing out of the test of annexation have led judges and text-writers to seek for some more satisfactory criterion. Thus, in some of the authorities, the *intention* of the party making the annexation is laid down as the true test of a fixture. *Winslow v. Ins. Co.*, *supra*, 2 Sm. L. C. 208. Others hold that the test of a fixture is its adaptation to the use and purposes for which the realty is appropriated, however slight its physical connection with it may be. *Voorhis v. Freeman*, 2 Watts & S. 114 (37 Am. D. 490); *Goffe v. O'Conner*, 16 Ill. 421; *Tabor v. Robinson*, 36 Barb. 483.

In a note to *Minn. Co. v. St. Paul Co.* 2 Wall. 609, 646, it is said that in the United States there are three different rules as to annexation established in different States:

1. The thing must be so fastened to the estate that its removal would seriously injure the freehold, beyond the loss of the thing removed.

2. If the chattel is essential to the use of the real estate, and actually though slightly attached, it will pass with the freehold.

3. If the thing be essential to the use of the real estate, and has uniformly been used with it, then it passes, though not fastened to it.

§ 19. **The Doctrine of Teaff v. Hewitt.**—In *Teaff v. Hewitt*, 1 Ohio St. 511 (59 Am. D. 634), it is said, in an able opinion by Bartley, C. J., that "the great difficulty which has always perplexed investigation upon this subject

filled up and occupied a gap left in the wainscoting. They were an essential part of the inner surface of the hall, and of a material and construction to correspond with and properly form part of such inner surface. Those in the parlor fitted into a gap purposely left in the baseboard. Both those in the hall and those in the parlor were fastened to the walls with hooks and screws. They could be removed, but their removal would leave unfinished walls, and require work upon the house to supply and repair their absence." And see also *Mackie v. Smith*, 5 La. Ann. 717; 52 Am. D. 615.

has been the want of some certain, settled, and unvarying standard by which it could be determined what amounts to a fixture, or what connection with the land will deprive a chattel of its peculiar legal qualities as such, and make it accessory to the freehold." And the learned judge concludes that "the united application of the following requisites will be found the safest criterion of a fixture: 1 Actual annexation to the realty, or something appurtenant thereto; 2, Appropriation to the use or purpose of that part of the realty with which it is connected; 3, The intention of the party making the annexation to make the article a permanent accession to the freehold; this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made."

This criterion of a fixture seems to have met with general approval. See 14 Am. D. 303, note to *Hunt v. Mullanphy*, 1 Mo. 508; 17 Am. D. 695, note to *Gray v. Holdship*, 17 S. & R. 413; 2 Dev. Deeds, § 1211; 1 Jones, Mortgages, § 429; *Potter v. Cromwell*, 40 N. Y. 287 (100 Am. D. 485); *Rogers v. Man. Co.*, 81 Ala. 483 (60 Am. R. 171); *Atchison, &c., R. Co. v. Morgan*, 42 Kans. 23 (16 Am. St. R. 471); *Green v. Phillips*, 26 Gratt. (Va.) 752 (21 Am. R. 323).¹

¹ In *Ottumwa Woolen Co. v. Hawley*, 44 Iowa, 57 (20 Am. R. 719, 724), it is said: "The three requisites laid down in the case of *Teaff v. Hewitt*, as constituting a fixture, it is said must all combine. The first, being physical attachment, all the cases hold is a very uncertain and unsatisfactory criterion, and in our opinion the only value to be attached to it is in determining the intention of the owner of the freehold in making the annexation. . . . The third requisite, being the intention of the party making the annexation to make a permanent accession to the freehold, is to our minds the controlling consideration in determining the whole question." And in an elaborate note to *Gray v. Holdship*, 17 Am. D. 695, it is said: "The decision in *Teaff v. Hewitt* satisfactorily solves the whole question by declaring that the degree or nature of annexation to the soil is only an element or

§ 20. **Constructive Annexation.**—In *Wolford v. Baxter*, 33 Minn. 12 (53 Am. R. 1), the law is thus laid down by Mitchell, J.: “While not agreeing as to the necessity for or the degree of importance to be attached to the fact of *actual* physical annexation, yet the authorities generally unite in holding that to constitute a fixture the thing must be of an accessory character, and must be in some way in actual or *constructive* union with the principal subject, and not merely brought upon it; that in determining whether an article is personal property, or has become a part of the realty, there should be considered the fact and character of annexation, the

circumstance (and even a subordinate circumstance tending to throw light upon the more material inquiry as to the intent in appropriating the chattel) in determining whether or not the chattel has become a fixture. . . . The true criterion of a fixture, in our judgment, is the united application of the following requisites: 1, ‘Actual annexation to the realty or something appurtenant thereto,’ with this modification, that the annexation is not of necessity an absolute fastening, or a continued physical union in all cases; 2, ‘Application to the use or purpose to which that part of the realty with which it is connected is appropriated; 3, The intention of the party making the annexation to make a permanent accession to the freehold.’ The requisite of intention is the most important, and should be clearly understood; the word ‘intention’ here having its broad and comprehensive signification, and not merely implying the secret action of the mind of the owner of the property. The owner of an important lot might deposit thereon a block of dressed stone, with no outward indication of appropriation to any use in connection with the land, and it could remain a chattel, notwithstanding some secret mental purpose of the owner that it should be and remain a part of the soil, and this even though the stone should in time settle partially into the earth; but if the owner should erect a building on the lot, and place this stone upon the surface of the ground in front of a door in such a manner as to become a step by which to reach the door and enter the house, and all the surrounding architecture, etc., indicated that it was intended for permanent use as a part of the general plan, it would at once become a fixture, and this, although the owner might entertain some secret intention of taking it away at some future time.”

nature of the thing annexed, the adaptability of the thing to the use of the land, the intent of the party in making the annexation, the end sought by annexation, and the relation of the party making it to the freehold. These other tests named, while having an important bearing upon the questions whether there has been an annexation, and if so its effect, do not, however, do away with the necessity of annexation, either actual or constructive, to constitute a fixture. This would involve a contradiction of terms, and wipe out the fundamental distinction between real and personal property. A thing may be said to be constructively attached when it has been annexed, but is separated for a temporary purpose, as in the case of a mill-stone removed for the purpose of being dressed; or when the thing, though never physically fixed, is an essential part of something which is fixed, as in the case of keys to a door, or the loose cover of a kettle set in brick work. It is perhaps somewhat on this principle that the permanent and stationary machinery in a structure erected especially for a particular kind of manufacturing has been held fixtures, although very slightly or not at all physically connected with the building, because without it the structure would not be complete for the purpose for which it was erected. Ponderous articles, though only annexed to the land by the force of gravitation, if placed there with the manifest intent that they shall permanently remain, may be fixtures.”¹ See *Wadleigh v. Janvrin*, 41 N. H. 503 (77 Am. D. 780); *Patton v. Moore*, 16 W. Va. 428 (37 Am. R. 789).

¹ The learned judge further says: “It has often been remarked, that the law of ‘fixtures’ is one of the most uncertain titles in the entire body of jurisprudence. The line between personal property and fixtures is often so close and so nicely drawn that no precise and fixed rule can be laid down to control all cases. It is difficult, if not impossible, to give a definition of the term which may be regarded as of universal application. Each case must be more or less dependent on its own peculiar facts. Whether a thing is a fixture or not has been sometimes said to

§ 21. Vendor and Vendee and Mortgagor and Mortgagee.

—The same rule as to fixtures which applies in favor of the heir, as between heir and executor, also applies in favor of the vendee, as between vendor and vendee; and in favor of the mortgagee, as between mortgagor and mortgagee, and this although the chattels were annexed to the land *after* the mortgage was made. And the same rule applies between a debtor and an execution debtor, and as to what is a part of the freehold and so subject to the mechanic's lien law. *Gray v. Holdship*, 17 S. & R. 413 (17 Am. D. 680); *Ward v. Kilpatrick*, 85 N. Y. 413 (39 Am. R. 674). Hill, *Fixtures*, § 60; Wms. Pers. Prop. 16, note; *Voorhis v. Freeman*, 2 W. & S. 116 (37 Am. D. 490); *Witmer's Appeal*, 45 Pa. St. 455 (84 Am. D. 505); *James v. R. Co.*, 6 Wall. 750; *Cullwick v. Swindell*, L. R. 3 Eq. 249; 2 Dev. Deeds § 1193; 1 Jones on Mortgages, § 428 *et seq.*

§ 22. **Examples of Fixtures.—Machinery.**—A number of illustrations of what are or are not considered fixtures as between the heir and the executor have already been given. The rule is the same, as we have seen, as between vendor and vendee, and mortgagor and mortgagee; and the cases deciding what shall pass under a sale or mortgage are very numerous. For full information, reference is made to 2 Devlin on Deeds, §§ 1191–1230; 1 Jones on Mortgages, §§ 428–456. It is practicable here to give a few instances only.

1. **Machinery in Mills and Factories.**—The cases on this subject are said to be in irreconcilable conflict. The diversity of decisions springs, no doubt, from the varying degrees of

be a question partly of law and partly of fact." See as to definition and test of fixtures, 37 Am. D. 494; 59 Id. 657; 62 Id. 69; 64 Id. 64; 77 Id. 780; 79 Id. 511; 83 Id. 475, 668; 85 Id. 747; 91 Id. 209; 92 Id. 243, 741; 100 Id. 435; 1 Am. Rep. 372; 26 Id. 286; 27 Id. 310; 49 Id. 152; 60 Id. 171; 13 Am. St. R. 147; 16 Id. 471; 18 Id. 903; 19 Id. 598; 21 Id. 231; 22 Id. 373.

importance attached by different courts to the several requisites for a fixture, as laid down in *Teaff v. Hewitt*, *supra*. Thus, if the *mode* of annexation is chiefly considered, one result is reached; if the *intention* of the owner to make a permanent accession to the freehold is magnified, a contrary conclusion is arrived at. In 1 Jones on Mortgages, § 444, it is said: "There is no certain criterion by which to determine in all cases what belongs to the one class, and what to the other. Different courts decide differently in regard to the same articles; and even the decisions of the same court do not always seem to be perfectly consistent. The varying circumstances of the cases seem sometimes to have an immediate influence upon the determination of the courts greater than the statement of them in the reports would seem to warrant." And Mr. Devlin says: "Perhaps the only rule that can be evolved from the mass of conflicting decisions is, that whether an article is a fixture or not must depend upon the combination of several tests, any one of which alone is not conclusive." He then gives the three requisites laid down in *Teaff v. Hewitt*, and adds that the presumption, in case of doubt, is that, as the interest of the vendor of real estate is permanent, all annexations that he has made are for his prolonged enjoyment, and for the substantial and continued enhancement in value of the property; and that the majority of the decisions consider everything which has been attached to the realty *for the purpose of adding to its value* as a fixture, passing with a conveyance of the land. 2 Dev. Deeds, §§ 1211, 1212.

In *Green v. Phillips*, 26 Gratt. 762, it is said: "The true rule deduced from all the authorities seems to be this: That where the machinery is permanent in its character, and essential to the purposes for which the building is occupied, it must be regarded as realty, and passes with the building; and that whatever is essential for the purpose for which the building is used will be considered as a fixture, although the connection between them is such that it may

be severed without physical or lasting injury to either." See this rule approved in *Patton v. Moore*, 16 W. Va. 428 (37 Am. R. 789); *Fratt v. Whittier*, 58 Cal. 126 (41 Am. R. 251).¹

¹ The following are instances of machinery held a fixture as between vendor and vendee, or mortgagor and mortgagee: Mill-chains, dogs, and bars in a saw-mill. *Farrar v. Stackpole*, 6 Greenl. (Me.) 154 (19 Am. D. 201). A gin-mill, erected in the gin-house, and fastened to it by nails and braces. *Degraffenreid v. Scruggs*, 4 Humph. (Tenn.) 451 (40 Am. D. 658). A boiler set in brick-work, and not removable without taking down brick-work, and steam-engine annexed by being bolted to granite block. *Richardson v. Copeland*, 6 Gray (Mass.) 536 (66 Am. D. 424). Machinery of a sash and blind factory, without which it cannot be operated, and attached to the mill by spikes, nails, bolts, and screws, and operated by belts running upon permanent horizontal shafting, driven by a water-wheel under the mill. *Symonds v. Harris*, 51 Me. 14 (81 Am. D. 553). Steam-engine and boiler, attached to the freehold, and furnishing the motive power for mill machinery. *Sweetzer v. Jones*, 35 Vt. 317 (82 Am. D. 639). Machinery for tool-making, when annexed to the freehold by being attached with bolts to a block set in the ground, and with screws and bolts to a building. *McLaughlin v. Nash*, 14 Allen (Mass.) 136 (92 Am. D. 741). A steam-engine, moulding and planing machines, attached to a sash, blind, and door factory. *Green v. Phillips*, 26 Gratt. 752 (21 Am. R. 323). The engine in a woolen mill by which the machinery was propelled, and the shafting, pulleys, and belts, and the carders, spinning jacks, and looms, although only attached to the building by cleats or screws to keep them in place. *Ottumwa, &c., Co. v. Hawley*, 44 Ia. 57 (24 Am. R. 719). Machinery used in canning business, when parts of it are annexed to the soil, and the other parts are necessary to the use of the parts so attached. *Dudley v. Hurst*, 67 Md. 44 (1 Am. St. R. 368). Machinery, shafting, rollers, &c., constituting a marine railway. *Tyson v. Post*, 108 N. Y. 217 (2 Am. St. R. 409). A steam-boiler and looms used in a mill as necessary parts of the machinery thereof, though held in position merely by their own weight. *Cavis v. Beckford*, 62 N. H. 229 (13 Am. St. R. 554). Heavy machinery procured for use in manufacturing cloth, and placed in a mortgaged cotton mill, and attached to the building by being fastened to the floor, and connected with the motive power, with

§ 23.—2. **Rolling Stock of Railways.**—The locomotives and cars of a railroad have been held fixtures in some cases, on the ground that they are annexed to the rails, and are adapted and appropriated to the use of the road, and essential to its working. But the later authorities are to the contrary. See 1 Jones on Mortgages, § 452, where the cases are collected, and the conclusion reached “that while there are many and strong arguments for holding that rolling stock is a part of the realty of a railroad—and this view has the support of the United States courts—the weight of authority in the state courts seems to be against that position.” See *Palmer v. Forbes*, 23 Ill. 300; *Pennock v. Coe*, 23 How. 117; *Strickland v. Parker*, 54 Me. 263; *Farmers’ Loan, &c. v. Bank*, 11 Wisc. 207; *Phillips v. Winslow*, 18 B. Monroe, 431 (68 Am. D. 679); *Minn. Co. v. St. Paul Co.*, 2 Wall. 609, and *note*. The following cases hold rolling stock to be *personal* property, *Sangamon, &c. R. Co. v. County of Morgan*, 14 Ill. 163 (56 Am. D. 497); *Coe v. Columbus &c.*

a view to permanence, and to be used with the building until worn out. *Hopewell Mills v. Bank*, 150 Mass. 519 (15 Am. St. R. 235). Saw-mill, and engine and boiler connected with and used to operate it, all attached to the land in the usual way. *Horne v. Smith*, 105 N. C., 322 (18 Am. St. R. 903).

On the other hand, there are cases in which machinery in a mill or factory is held not to be a fixture, sometimes for want of annexation, and sometimes for want of *sufficient* annexation. Thus in *Hubbell v. Bank*, 132 Mass. 447 (42 Am. R. 446), it was held that heavy machines in a factory, steadied by being screwed to the floor, but removable without injury to the building and useful elsewhere, are not fixtures within a mortgage of the land. And in *Teaff v. Hewitt*, *supra*, it was held that machinery in a factory is not a fixture where it is connected with the motive power by means of bands and straps, and attached to the building only so far as to confine the different parts in their proper places for use, and is subject to removal as the interest of business or convenience may require, without injury to the machinery itself or the building. And in *Devlin on Deeds*, § 1214, this is said to be the general American doctrine, though there are many cases to the contrary.

R. Co., 10 Ohio St. 372 (75 Am. D. 518); *Chicago, &c. R. Co. v. Ft. Howard*, 21 Wise. 44 (91 Am. D. 458); *Randall v. Ellwell*, 52 N. Y. 521 (11 Am. R. 747); *Hoyle v. Plattsburgh, &c. R. Co.*, 54 N. Y. 314 (13 Am. R. 595). In many of the States mortgages of rolling stock are regulated by statute. In some rolling stock is declared personal property by constitutional provision. See 1 Jones Mortgages, § 452, and notes.

§ 24.—3. **Miscellaneous Fixtures.**—*Gas-fixtures.*—These consist of burners, brackets, and chandeliers, attached to gas-pipes, from which they may be removed without injury to the building. By the weight of authority they are but chattels, and do not pass by a deed of the premises. On principle, it would seem that such appendages to gas-pipes are true fixtures, and this view is vigorously maintained in note to *Gray v. Holdship*, 17 Am. Dec. 691, where the cases are reviewed. See 2 Dev. Deeds, § 1225; *McKeage v. Ins. Co.*, 81 N. Y. 38. *Stoves* are not usually fixtures, but they become so when they are so surrounded by the brick-work of the chimney that it is necessary to take it down in order to remove them. See 42 Am. Rep. note; *Blethen v. Towle*, 40 Me. 310; *Goddard v. Chase*, 7 Mass., 432. *Furnaces* may or may not be fixtures, according to the mode of connection with the building and facility of removal. See 1 Jones, Mortgages, § 433 *a*; 42 Am. Rep. note; *Mather v. Fraser*, 2 Kay & J. 536; *Rahway Sav. Ins. v. Baptist Church*, 36 N. J. Eq. 61. *Manure* made in the ordinary course of husbandry upon a farm is a fixture, and passes by a deed of mortgage. But this doctrine does not apply to manure made in a livery stable. *Wetherbee v. Ellison*, 10 Vt. 379; *Proctor v. Gilson*, 49 N. H. 62. A *worm fence* is a fixture. *Climer v. Wallace*, 28 Mo. 556 (75 Am. D. 135); *Mott v. Palmer*, 1 N. Y. 564. *Hop-poles* are held fixtures not only while in use but also while piled upon the premises awaiting use the next season. *Bishop v. Bishop*, 11 N. Y. 123 (62 Am. D. 68). An *organ* is a

fixture in a recess in a church, if the space was left in the building of the church exclusively for the organ, so that the edifice was left incomplete and unfinished until the organ was put into position. *Rogers v. Crow*, 40 Mo. 91 (93 Am. D. 299). A *bathing tub* and lead water-pipes fastened to the walls and floor of a building by nailing are fixtures. *Cohen v. Kyler*, 27 Mo. 122. A *hotel sign* may be a fixture. *Redlon v. Barker*, 4 Kans. 382 (96 Am. D. 180). A *church bell* is a fixture. *Cong. Soc. v. Fleming*, 11 Ia. 533 (79 Am. D. 511).

II. *Fixtures between the Executor of a Tenant for Life and the Remainderman or Reversioner.*

§ 25.—**Rule Relaxed in Favor of the Executor.**—The strict common law as to fixtures is somewhat relaxed in this case in favor of the executor, who may, therefore, claim against the reversioner things which he cannot claim against the heir. For example, a steam or fire engine erected in a colliery will go as assets to the executor of a life tenant. *Dudley v. Warde*, Ambl. 113; *Lawton v. Lawton*, 3 Atk. 13. And in *Estate of Hinds*, 5 Whart. (Pa.) 138, (34 Am. Dec. 542), it was held that a steam engine erected by a tenant for life, for the purpose of carrying on a trade, may be removed after his death by his representative. The favor shown the executor is intended to encourage tenants for life to carry on trades and mining operations, and to provide suitable machinery therefor. But the extent to which the law favors the executor in this case is not well settled, as few cases have come before the courts. It may be doubted whether the executor would be allowed to remove any ornamental fixtures, or, in England at least, those intended for agricultural purposes. And even as to *trade* fixtures, it is said that the right of removal will be limited to such as are erected for the purposes of trade proper, and will not be extended to occupations having merely an affinity or resemblance to trade. See 2 Sm. Lead. Cas. 246; 1 Schoul. Pers. Prop. 144; 1 Lead.

Cas. Real Prop. (Sharsw. & Budd), 208; *D'Eyncourt v. Gregory*, L. R. 3 Eq. 380. And it is said that a tenant for life or his representative cannot remove buildings of a permanent character; and that it is presumed that improvements put on the property by life tenants are designed, not for the temporary use of such tenants, but as permanent additions. *Cannon v. Hare*, 1 Tenn. ch. 22, *per* Cooper, C.

III. *Fixtures between Landlord and Tenant.*

§ 26. **General Principles.**—The law in this case, in order to promote industry and encourage trade, is exceedingly liberal to the tenant. In fact, the ancient rule that chattels affixed to the freehold cannot be removed, has hardly any application at all, provided the appendages are for the benefit of trade; and in the United States, the tendency is to put agricultural fixtures upon the same footing. Public policy, especially in this country, requires that the tenant should be permitted so to use the premises he occupies as to derive the greatest amount of profit and comfort consistent with the rights of the owner of the freehold. It is obvious that the rule which obtains where the *owner* of land makes annexations thereto, should not be applied to *tenants* with a mere temporary interest. Their erections can hardly be intended to enhance the value of the inheritance, and to be permanent accessions to the freehold; and to refuse them permission to remove chattels affixed during the term for purposes of trade, manufacture, or domestic purposes, would be unreasonable and unjust. See Taylor Landlord & Ten. §§ 545–555; 2 Dev. Deeds, § 1193; 2 Lead. Cas. Real Prop. 96–99; *Wall v. Hinds*, 4 Gray (Mass.), 256 (64 Am. Dec. 64); *Lacey v. Giboney*, 36 Mo. 320 (88 Am. Dec. 145); *Conrad v. Mining Co.* 54 Mich. 249 (52 Am. R. 817).

§ 27.—What Erections Removable.—1. Trade Fixtures.¹—

It is well settled that whatever erections or additions a tenant makes for the purposes of *trade*, even though affixed to the soil or building, remain chattels, and are removable by the tenant; and so completely are they considered the property of the tenant, that they may be levied on and sold, under an execution against him, as his goods and chattels, and on his death, they will go to his personal representative.

As to what are trade fixtures, this will of course vary with the nature of the business. In *Seeger v. Pettit*, 77 Pa. St. 437 (18 Am. R. 452), a tenant in trade was allowed to remove a coal bin, gas fixtures, stairway and banisters, closet, platform scales, etc. And in *Carlin v. Ritter*, 68 Md. 478 (6 Am. St. R. 467), the following were held trade-fixtures when erected by the tenant of a hotel: A bake-house and oven, the fountain in the yard, the awning in front of the house, the furnace in the cellar for heating the building, the wash-tubs in the laundry, the grates for burning coal fastened into the fire places in the rooms, the inside shutters to the windows, the counter in the office rooms, the counter and shelving in the cigar store, the counter, shelving, and mirrors in the bar-room (the mirrors being glasses framed and fastened into panels made in the wall, and not merely framed mirrors hung on hooks), the shelving in the pantry store-room, and the inside iron doors in

¹ It will be observed that the term "Trade Fixtures" describes chattels which, although annexed to the land by the tenant, do *not* become part of the freehold, but are *removable* by the tenant. The same is true of the term "Domestic Fixtures," and in some of our States of "Agricultural Fixtures." This use of the word "fixture" is contrary to the definition adopted in § 15, *supra*; but the above expressions are too well established to be altered or ignored. The student must remember, however, that in them the word "fixture" means no more than a chattel annexed to the soil or building, and does not imply that it has ceased to be removable, and become part of the freehold.

the stable. And in *Van Ness v. Packard*, 2 Pet. 137, it was held that a tenant was not liable for waste for pulling down and removing a wooden dwelling-house, with a stone cellar and brick chimney, which he erected upon a lot of land he had rented for a term of years, for the purpose of carrying on the business of a dairyman, and for the residence of his family and servants engaged in the business. The principle has been held to extend to gardeners and nurserymen, who are considered tradesmen, and who may take away from leased premises their green-houses and hot-houses, and all trees, shrubbery, etc., planted for the purposes of sale. Tayl. L. & T., § 546.¹

§ 28. 2. **Domestic Fixtures.**—A tenant is also allowed to disannex and take away what are called *domestic* fixtures, *i. e.*, such as he puts up for ornament and the more convenient use of the premises. Under this class come bells, bell-pulls, gas-fixtures, wainscots, marble chimney-pieces, grates, etc. It is manifest that the same article may be a *trade* or *domestic* fixture, according as the building is occupied for business or for residence purposes only. Thus in *Wall v. Hinds*, 4 Gray (Mass.) 256 (64 Am. D. 64), the premises were leased for a tavern and boarding-house. The tenant put in a water-tank and sinks, fastened to the building by nails, or fitted to the floor by cutting away flooring; and also extended gas and water-pipes through the buildings, passing through holes in floors, ceilings and partitions cut for the purpose, and kept in place by hooks and metal

¹ But as between vendor and vendee, mortgagor and mortgagee, nursery stock is a fixture, and will pass on sale or mortgage. And if a person occupies land as a tenant, but is merely a farmer, and not a professional nurseryman or gardener, he cannot carry away young fruit trees raised on the demised premises for the purpose of planting in his garden or orchard. *Coombs v. Jordan*, 3 Bland's Ch. 284 (22 Am. D. 236); *Smith v. Price*, 39 Ill. 28 (89 Am. D. 284); *Kelly v. Austin*, 46 Ill. 156 (92 Am. D. 243); *Holbrook v. Chamberlin*, 116 Mass. 155 (17 Am. R. 146); *Adams v. Beadle*, 47 Ia. 439 (29 Am. R. 487).

bands; the building having previously been supplied with water and light by other means. He was allowed to remove all these articles, the court saying that they were "of a mixed nature, and might well be regarded as combining the qualities of both domestic and trade fixtures."

But all domestic fixtures are not removable by a tenant. The exceptions grow out of the mode of annexation, and the fact that the article is necessary for the *completion of the building*, as well as for the comfort and enjoyment of the tenant in its use. In such case, the chattel is considered as irrevocably appropriated to the building, being affixed *perpetui usus causa*, or as it is sometimes expressed, *pour un profit del inheritance*. In this class of *irremovable* domestic fixtures, Mr. Taylor ranks hearthstones, doors, windows, locks and keys, etc. See Taylor L. & T. § 547. *Wall v. Hinds, supra*.

§ 29.—3. **Agricultural Fixtures.**—As to buildings, out-houses, etc., which have been erected for *agricultural* purposes, it has been held in England that they are fixtures which the tenant cannot remove. This was decided in the leading case of *Elwes v. Maw, supra*. There the tenant of a farm, under a lease for twenty-one years, was held liable for waste for removing a beast-house, a carpenter's shop, a wagon-house, a fuel-house, etc., which he had erected. The ground of the decision was that these were not *trade* fixtures. But the tendency in the United States is to make no distinction between trade and agricultural fixtures, but to allow the removal of both. See *Van Ness v. Packard*, 2 Pet. 137, *per* Story, J.; *Whiting v. Brastow*, 4 Pick. 310. And in Alabama it was held that the common law rule as to agricultural fixtures, as laid down in *Elwes v. Maw*, was inapplicable in that State; and that agricultural fixtures erected by tenants should receive the same protection in favor of the tenant as fixtures made for the purposes of trade. *Harkness v. Sears*, 26 Ala. 493 (62 Am. D. 742). But in New York the Court of Appeals refused to sanction a de-

parture from the English rule. *Ombony v. Jones*, 19 N. Y. 234.

§ 30.—**Manure.**—We have seen that manure made in the ordinary course of husbandry on agricultural land is a fixture, and passes to a vendee or mortgagee. *Kittridge v. Woods*, 3 N. H. 503 (14 Am. D. 393). And this too though the manure is not spread on the ground, but is lying in the barnyard, though there is one case to the contrary. *Ruckman v. Outwater*, 28 N. J. Law 581. But not only is manure a fixture as between vendor and vendee, etc., but the same doctrine applies even as between landlord and tenant; and manure made on a farm occupied by a tenant, consisting of the collections from the stable, etc., is considered so inseparably annexed to the freehold that it cannot be removed by the tenant at the end of his term. See Tayl. L. & T. § 541; 14 Am. Dec. 397, note to *Kittridge v. Wood*, *supra*, citing many cases. But in one case, *Smithwick v. Ellison*, 2 Ired. Law (N. C.) 326 (38 Am. D. 697), it is held that an outgoing tenant may remove the manure made by him during the term, if he does so before its expiration. And everywhere manure *made in a livery stable* belongs to the tenant. See Tyler, Fixtures, § 356. *Daniels v. Pond*, 21 Pick. (Mass.) 367 (32 Am. D. 269); *Lewis v. Jones*, 17 Pa. St. 262 (55 Am. D. 550); *Chase v. Wingate*, 68 Me. 204. (28 Am. R. 36, and note).¹

¹ MANURE.—Code Virginia, § 2779, enacts: "If a tenant at will or for years, without special license so to do, remove by sale or otherwise from the leased premises, manure made thereon in the ordinary course of husbandry, consisting of ashes leached or unleached, collections from the stables, barnyard, cattle pens, or other places on the leased premises, or composts formed by an admixture of these or any of them with the soil or other substances, such removal shall be deemed waste, and within the provisions of the preceding sections of this chapter" [*i. e.*, § 2778, giving an action on the case for waste, and directing judgment for *treble damages* when waste is *wanton*; and the three preceding sections.]

§ 31. **Qualification of the Right of Removal by Tenant.**—In Taylor L. & T. § 550, it is said: "The rule in regard to the removal of fixtures, however, requires that the article be capable of removal without the destruction or serious injury of the freehold; that is, the premises must be in as good plight and condition as they were before the annexation." Thus, in *Cullamore v. Gillis*, 149 Mass. 578 (14 Am. St. R. 460), it was held that a baker's oven is not a removable fixture when built by the tenant upon the landlord's premises in such manner that it becomes a fixed and permanent structure, so united with the building that the two are inseparable without the destruction of the one and substantial injury to the other, and so built that when taken down it loses its character as an oven, and with the exception of an iron lining and door becomes mere brick and mortar. And when the tenant exercises the right of removal, he must repair any damages the premises may have sustained by the act of removal, beyond the loss of the thing removed. *Seeger v. Pettit, supra*. And if the tenant has taken down an article and put another of his own in its place, if he removes his own, he is bound to restore the other, or to replace it by a similar article. Tayl. L. & T. § 550.

§ 32. **Time of Removal.**—Whatever fixtures the tenant has a right to remove must be removed before his term expires, or at least before he quits possession; for if the tenant leaves the premises without removing them, and the landlord takes possession, they become the property of the landlord. And the true principle seems to be that the annexation of a chattel to the freehold by a tenant is a conditional gift thereof to the landlord, which may be defeated by its timely removal, but otherwise becomes absolute. 2 Sm. Lead. Cas. 257; Taylor Landl. & Ten. § 551; *Holmes v. Tremper*, 20 Johns. 29 (11 Am. Dec. 238, and note); *Gaffield v. Hapgood*, 17 Pick. (Mass.) 192 (28 Am. Dec. 290); *Stockwell v. Marks*, 17 Me. 455 (35 Am. Dec. 266); *Childs v. Hurd*, 32

W. Va. 66; *Kutter v. Smith*, 2 Wall. 491. And if, without surrendering the possession, the tenant renews his lease, making no reservation of a right to remove the fixtures already erected by him, the right to remove such fixtures is lost. For the new lease supersedes the old, and the fixtures were not removed during the continuance of the old term. See *Taylor Landl. & Ten.* § 552; *Loughran v. Ross*, 45 N. Y. 792 (6 Am. R. 173); *Watriss v. Bank*, 124 Mass. 571 (26 Am. R. 694); *Carlin v. Ritter*, 68 Md. 478 (6 Am. St. R. 467).¹

The rule laid down above as to time of removal always applies where the term is of certain duration, as under a lease for a term of years, which contains no special provisions as to fixtures. But where the term is uncertain, or depends upon a contingency, as when a party is in as tenant for life or at will, fixtures may be removed within a reasonable time after the tenancy is determined. *Watriss v. Bank*, *supra*. And if a tenant leaves a fixture after the expiration of his term, by reason of the landlord's promise to sell it for the tenant's benefit, the tenant still has a reasonable time after the term to remove it; for otherwise the landlord would work a fraud on the tenant. *Torrey v. Burnett*, 9 Vroom (N. J.) 457 (20 Am. R. 421).

¹ In *Carlin v. Ritter*, 68 Md. 478 (6 Am. St. R. 467), it is said: "All the elementary writers concur in laying down the proposition, that if a tenant having the right to remove fixtures erected by him on the demised premises accepts a new lease of such premises, without reservation or mention of any claim to such fixtures, and enters upon a new term thereunder, the right of removal is lost, notwithstanding his actual possession has been continuous. And the reason given is because the fixtures set upon the premises at the time of the lease are part of the thing demised, and the tenant by accepting a lease of the land without reserving his right to the fixtures, has acknowledged the right of his landlord to them, which he is afterwards estopped from denying." The above is the well-nigh universal doctrine; but it is denied by Judge Cooley in *Kerr v. Kingsbury*, 39 Mich. 150 (33 Am. R. 362), on the ground that it is against public policy, and that the second lease ought not to be held to include the removable fixtures, unless from the lease itself an understanding to that effect is plainly inferable.

CHAPTER III.

ESTATES OF FREEHOLD.

I. *Freehold Estates of Inheritance.*

§ 33. **Classification.**—The estates of inheritance are, (1), Fee-simple; (2), Base or qualified fee; (3), Fee-conditional at common law; and (4), Fee-tail. Of these in their order.

§ 34. 1. **Fee-Simple.**—**Nature of an Estate in Fee.**—The word *fee* originally signified land *holden* of a superior, as distinguished from *allodial* land, fee and feud being synonymous. But *fee* is now employed to denote the quantity of interest the tenant has in land, and is confined to estates of inheritance, *i. e.*, those which may descend to a man's heirs. When the word fee is used alone it means fee-simple.

An estate in fee-simple is the entire interest and property in land, from which it follows that no person can have a greater estate or interest. Accordingly, whenever a man grants his land in fee-simple, he cannot make any further disposition of it; he has already granted the entire interest, and there is nothing left in him upon which any further grant can operate. The exceptions to this doctrine in the cases of a contingency with a double aspect, uses, and executory devises, will be considered hereafter.

The word "simple," in the combination fee-simple, is used to distinguish this estate from a base fee and from the fee-conditional at common law. But estates in fee-simple may be granted upon *express* conditions, of which hereafter.

§ 35. **Limitation of a Fee by Feoffment.**—A fee-simple at common law is that interest which the tenant has in land given *to him and his heirs*. And at common law the words

“and his heirs,” are indispensable. No circumlocution has ever been held sufficient to create a fee-simple by a common law conveyance.¹ If a feoffment or grant be made, “To A and his heirs,” the word “heirs” is called a *word of limitation*, i. e., a word used to mark out, define, and *limit* A’s estate, and to make it a fee-simple. The heirs of A are not in existence during his life—*nam nemo est haeres viventis*—and hence they take nothing under the feoffment to A and his heirs. A takes the whole interest, with full power of disposition. “All his heirs are so totally in him,” says Lord Coke, “that he may give the land to whom he will.” Co. Litt. 22 b. Wms. on R. P. (39) n. 1.

By the policy of the Feudal System, lands, although holden in fee-simple, were inalienable by the tenant without the consent of his lord. But as early as the reign of Hen. III. (1216–1272), the right to sell had been acquired by tenants in fee-simple; and this right was expressly recognized by the statute of *Quia Emptores*, 18 Ed. I. (1290), by which it was declared that it should be “lawful for every freeman to sell at his own pleasure his lands and tenements, or part thereof.” Wms. on R. P. (61). From this time, certainly, there have been no restraints imposed by law on the alienation of the fee-simple, but on the other hand, the doctrine has been established that if the grantor of a fee imposes a condition in *total* restraint of alienation, it is repugnant to the estate

¹ That in a deed at common law the word “heirs” was indispensable to confer a fee-simple, see *Hollingsworth v. McDonald*, 2 Harr. & J. (Md.) 230 (3 Am. Dec. 545); *Leitensdorfer v. Delphy*, 15 Mo. 160 (55 Am. Dec. 137); and, especially, *Adams v. Ross*, 1 Vroom (N. J.) 505 (82 Am. Dec. 237; 1 Sh. & B. L. C., Real Prop. p. 11). But in 1 Washb. R. P. it is said that “if an estate be granted clearly in fee, and the deed by which it is again granted, instead of being to the grantee and his heirs, be to him as fully as it was granted in the former deed, referring to it, it is only borrowing the words of limitation from the former deed, and conveys a fee.” See, too, *Gould v. Lamb*, 1 Metc. (Mass.) 84 (45 Am. Dec. 187), where this *apparent* exception is recognized.

granted, and, therefore, void. 2 Tho. Coke (26). 1 Prest. on Est. (477).

An estate in fee-simple, on the death of the owner intestate, will descend to his kindred, lineal or collateral, no matter how remote, in an order marked out by the statutes of descent. And a limitation to one and his *right* heirs is the same as to him and his heirs. And a limitation directly "to the heirs of B" conveys a fee-simple to such heirs, without adding, "and their heirs." Wms. on R. P. (255). Co. Litt. 10 a. 4 Cruise 276.

§ 36. **Limitation of a Fee by Devise.**—We have seen that at common law, by feoffment or grant, the word "heirs" is absolutely necessary in order to limit a fee. But a different rule, by indulgence to testators, prevailed as to wills, and in a devise the doctrine was that any words showing the *intention* would pass the fee. Thus, to A forever, to A in fee-simple, etc., gave the fee-simple.¹ And now in England by the Wills Act of 1837, taking effect January 1, 1838, where any real estate shall be *devised* to any person without any words of limitation, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which

¹ The doctrine at common law that even a *devise* to A, without more, passed only a life estate to A, no doubt caused the frequent defeat of the intention of testators, and the courts, we are told, were astute in seizing on every circumstance or expression which tended to show that the gift was meant to embrace the inheritance, and was not to be confined to a mere life estate. See Wms. R. P. (19); Id. (215) and note. Thus the use by the testator of the word "estate" might suffice to carry the fee; as where the devise was of "all my real and personal estate" (*Godfrey v. Humphrey*, 18 Pick. 537; 29 Am. Dec. 621); and so where the testator devised "all the estate called Marrowbone, in the county of Henry" (*Lambert's Lessee v. Paine*, 3 Cr. 97); and so even where the devise was, "to my son all that farm or estate I bought of B, containing about twenty acres, situated at Q, in the parish of H," etc. (*Burton v. White*, 7 Exch. 720). Again the use of the word "property" may carry the fee, as in *Mayo v. Carrington*. 4 Call (Va.), 472 (2 Am. Dec. 580), where "all my other property"

the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will. Wms. on R. P. (206). It will be seen that this statute only applies to a *devise*; and the rule in England is still inflexible that in a *deed* a fee cannot pass without the magic word "heirs."

In Virginia, however, by a statute taking effect January 1, 1787, it is enacted that words of limitation may be dispensed with in the creation of a fee-simple in all cases; and the language of the Code is now identical with that of the English Wills Act, quoted above, except that the words "conveyance" and "grant" are added to "devise." Code 1849, ch. 118, § 8. Code 1877, § 2420. So now in Virginia, a limitation, either by deed or by will, "to A," without adding other words, will pass to him the fee-simple, if the grantor or testator is seised in fee, unless a contrary intention be made to appear. And this is the rule in the United States generally. Wms. on R. P. (19) n. 1; (20) n. 1; (141.) 2 Bl. Com. 107-'8.

§ 37.—2. **Base or Qualified Fee.**—This estate is also called a *determinable* fee. Following Chan. Kent (4 Com. 9), we shall treat the terms base, qualified, and determinable, as synonymous.

A base fee, then, is an estate which may last *forever*, but whose duration is circumscribed by something collateral to it, which *may* never happen; but, if it does happen, the es-

served to pass a fee in lands. See also *Jackson v. Housel*, 17 Johns. R. 281. And see *Davies v. Miller*, 1 Call, 127; *Watson v. Powell*, 3 Id. 306; *Kennon v. McRoberts*, 1 Wash. (Va.) 96; *Wyatt v. Sadler*, 1 Munf. 537. And it was also held that a *personal* charge upon the devisee of land imputed a fee; but it was otherwise when the charge was on the *land* only. See Tied. R. P. § 37; Wms. R. P. (215) n. 1. But it was held that the words "lands and tenements," and even "hereditaments," would not pass the fee, as they are descriptive of the *thing devised*, and not of the *quantum* of interest. See § 7, *Supra*, note 1. See, especially, *Wright v. Denn*, 10 Wh. 204.

tate is, immediately and *ipso facto*, at an end. The estate is a fee, but limited to end upon an event which may never take place. The event is in the nature of a *limitation* of the estate, and not an express *condition*, whereby to defeat it. An estate is limited *until* the event and no longer; but, as the event may not happen, the law considers the estate a fee. 2 Bl. Com. (109).

These examples of base fees may be given: (1), To A and his heirs so long as B shall have heirs of his body; (2), To A and his heirs until B's marriage; (3), To A and his heirs till B shall attain the age of 21; (4), To A and his heirs till B returns from Rome.

In the first example, the estate of A is a base fee, and it can never become absolute, for it is never possible to say that the issue of B will not fail. But in the last three examples, the estate, though at first base, may become absolute. For if B dies before marriage, or before he reaches twenty-one, or before he returns from Rome, it becomes impossible that the event expressed for the determination of the estate of A should ever arise, and it is, therefore, no longer qualified or determinable.

If, in the examples above, the word "heirs" be omitted in the limitation to A, he will have a life estate only. It cannot last longer than for his life, though it may end sooner.

And it should be observed that an estate, to A and his heirs during the widowhood of B, or during the time B shall remain at Rome, is merely an estate of freehold measured by a life; for the widowhood of B or the residence of B at Rome will determine with her death. And it is one of the essential qualities of an estate in fee that it *may* last forever. An estate, to A and his heirs during the life of B is merely a freehold with a descendible or transmissible quality, and the heir is entitled as special occupant. (1 Prest. Est. 481; Wms. on R. P. 20.)

So long as a base-fee continues, the owner has all the rights with respect to it which he would have as to a fee-

simple. It will descend to his heirs, if not sold; and if sold, it will determine (end) upon the happening of the event upon which it was limited into whosoever hands it may have come. (1 Prest. Est. 440; 1 Wash. R. P. 63.)

§ 38. 3. **Fee-conditional at Common Law.**—A fee-conditional at common law was limited by the words, “To A and the heirs of his body,” the identical words which by and after the statute of *De Donis Conditionalibus*, gave an estate-tail. So the fee-conditional at common law is the parent of the fee-tail by the statute. 2 Bl. Com. (110).

When after the Conquest estates first became hereditary in England, upon a feoffment to A and his heirs, the word “heirs,” for feudal reasons, was considered to mean *lineal* heirs only, or the descendants of the body of A, to the exclusion of his collateral relations, such as brothers and cousins. The descent was to the *blood of the first purchaser*; and the fiction of *novum feudum* held *ut antiquum* had not yet been invented whereby to let in collateral heirs. There were at this time no estates in fee-simple, and therefore a limitation, “To A and the heirs of his body,” was held to give him the *entire* estate or interest, leaving no *reversion* in the feoffor, but merely a possibility or chance of receiving back the land if A died without issue, which possibility was called his *right of reverter*.

But the word “heirs” having in course of time come to signify collateral as well as lineal heirs, it became necessary for the feoffor, if he wished to confine the estate to the lineal heirs of the feoffee, to limit it expressly to him and the heirs *of his body*. And this estate was called a fee or fee-simple conditional, because of the condition implied in the donation, that if the feoffee died without heirs of his body, or in case of the failure of such heirs at any future time, the land should return to the feoffor. The entire interest in the land was still considered to pass to the feoffee as soon as the feoffment was made: the feoffor had no reversion, nor could he grant a remainder after the fee-conditional. The condition was the birth

of issue. The fee, however, was in the feoffee *at once*; the birth of issue was not the cause of his having the fee—a condition *precedent* to its vesting in him; but the non-birth of issue was the cause of his losing the fee—a condition *subsequent* upon the failure of which a fee already vested was divested and lost. The condition was subsequent to the vesting of the fee. 2 Bl. com. (110) *n.* 11; Id. (154).

It was the intention of the givers of fee-conditional estates that, by their right of reverter, the land should return to them not only when the feoffee *never had* issue, but when, although there was issue born, such issue failed at any time whatever. The language of *De Donis* is express upon this point. But the judges, favoring freedom of alienation, held that upon the birth of issue the estate was *at once* absolute in the donee for the three purposes of selling, forfeiting, and encumbering, as if the estate had been an original fee-simple. See as to this 2 Bl. Com. (110).

The effect given by the judges to the birth of issue operated to the injury of the lords in two ways: 1. If a lord was the owner of a fee-conditional, it enabled him, upon issue born, to sell or encumber it. It might also be forfeited for his treason. Thus the power of the great families was weakened; 2. If a lord had given a fee-conditional to a vassal, such lord lost his chance of reverter by the mere birth of issue, which enabled the vassal to sell the land.

For these reasons, the nobility procured the enactment of the statute of *De Donis Conditionalibus*¹ (13 Ed. I. (1285)

¹ DE DONIS.—The full text of the famous statute of *De Donis Conditionalibus* (also called Statute of Westminster, 2d), is as follows:

“1. First, concerning lands that many times are given upon condition, that is, to-wit, where any giveth his land to any man and his wife, and to the heirs begotten of the bodies of the same man and his wife, with such condition expressed that if the same man and his wife die without heirs of their bodies between them begotten, the land so given shall revert to the giver or his heir. In case also where one giveth lands in free marriage, which gift

c. 1), which was intended to render lands inalienable, and to keep up the feudal system, which the lords held in high esteem.

§ 39.—4. *Estate-tail*.—The effect of the statute of *De Donis* upon a gift “To A and the heirs of his body,” was to *cut* the entire interest, which, as we have seen, passed before this to the donee of a fee-conditional, into *two estates*, viz.: an estate-tail in the donee, and a fee-simple in reversion after failure of issue in the donor. A fee-tail was regarded

hath a condition annexed, though it be not expressed in the deed of gift, which is this, that if the husband and wife die without heirs of their bodies between them begotten, the land so given shall revert to the giver or his heir. In case also where one giveth land to another and the heirs of his body issuing; it seemed very hard, and yet seemeth to the givers and their heirs, that their will being expressed in the gift was not heretofore, not yet is observed. In all the cases aforesaid, after issue begotten and born between them (to whom the lands were given under such condition) heretofore such feoffees had power to alien the land so given, and to disherit their issue of the land, contrary to the minds of the givers, and contrary to the form expressed in the gift. And further, where the issue of such feoffee is failing, the land so given ought to return to the giver or his heir, by form of the gift expressed in the deed, though the issue (if any were) have died; yet by the deed and feoffment of them (to whom the land was so given upon conditions), the donors have heretofore been barred of their reversion, which was directly repugnant to the form of the gift.”

“2. Wherefore our lord the king, perceiving how necessary and expedient it should be to provide remedy in the aforesaid cases, hath ordained, that the will of the giver, according to the form in the deed of gift manifestly expressed shall be from henceforth observed; so that they to whom the land was given under such condition, shall have no power to alien the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver, or his heirs, if issue fail (whereas there is no issue at all), or if any issue be, and fail by death, or heir of the body of such issue failing. Neither shall the second husband of any such woman, from henceforth, have anything in the land so given upon condition, after

as a *smaller* estate carved out of the fee-simple. Hence the donor had a true *reversion*, not a mere *reverter*; and hence, after a fee-tail, a *remainder* may be granted of the fee-simple.

The name *fee-tail*, or *feodum-talliatum*, was borrowed from the feudists, amongst whom it signified any *mutilated* or *truncated* inheritance, from which the heirs general were cut off. The word *tail* is from Fr. *tailler* to cut. And, under *De Donis*, the term *fee-tail* might also be considered, to refer to the fact that the estate is *cut* or carved out of the entire fee which had been before held to pass.

For the effect of the strict entail produced by *De Donis*, see 2 Bl. Com. (116). And for the way in which, after two hundred years, relief was obtained by that "bold and unexampled stretch of judicial legislation—a Common Recovery" (4 Kent. Com. 13), see *Taltarum's Case*,¹ 2 Bl. Com.

the death of his wife, by the law of England, nor the issue of the second husband and wife shall succeed in the inheritance, but immediately after the death of the husband and wife (to whom the land was so given), it shall come to their issue, or return unto the giver, or his heir, as before is said. And forasmuch as in a new case a new remedy must be provided, this manner of writ shall be granted to the party that will purchase it." See 2 Washb. Real Prop., Appendix, p. 694.

¹ COMMON RECOVERY.—The procedure in a common recovery is thus clearly described in *Williams on Real Property*, pp. 45, 46: "In this case, called *Taltarum's Case*, the destruction of an entail was accomplished by judicial proceedings collusively taken against a tenant in tail for the recovery of the lands entailed. Such proceedings were not at that time quite unknown to the English law, for the monks had previously hit upon a similar device for the purpose of evading the statutes of mortmain, by which open conveyances of lands to their religious houses had been prohibited; and this device they had practiced with considerable success till restrained by act of parliament. In the case of which we are now speaking, the law would not allow the entail to be destroyed simply by the recovery of the lands entailed by a friendly plaintiff on a fictitious title; this would have been too barefaced; and in such a case the issue of the tenant, claiming under the gift to him in tail, might have recovered the lands by

(117) and (357). Both fines and recoveries were abolished in England in 1833, and an estate-tail may now be passed there by a simple deed enrolled in Chancery. Wms. on R. P. (48). The right to suffer a recovery was held an *insepa-*

means of a writ of *formedon*, so-called because they claimed *per formam doni*, according to the form of the gift, which the statute had declared should be observed. The alienation of the lands entailed was effected in a more circuitous mode, by judicial sanction being given to the following proceedings, which afterwards came into open and frequent use, and had some little show of justice to the issue, though without any of its reality. The tenant in tail, on the collusive action being brought, was allowed to bring into court some third person, presumed to have been the original grantor of the estate-tail. The tenant then alleged that this third person had *warranted* the title; and accordingly begged that he might defend the title which he had so warranted. This third person was accordingly called on; who, in fact, had had nothing to do with the matter; but, being a party in the scheme, he admitted the alleged warranty, and then allowed judgment to go against him by default. Whereupon judgment was given for the demandant, or plaintiff, to recover the lands from the tenant in tail; and the tenant in tail had judgment empowering him to recover a recompense in lands of *equal value* from the defaulter, who had thus cruelly failed in defending his title. If any such lands had been recovered under the judgment, they would have been held by the tenant for an estate-tail, and would have descended to the issue in lieu of those which were lost by the warrantor's default. But the defaulter, on whom the burden was thus cast, was a man who had no lands to give, some man of straw, who could easily be prevailed on to undertake the responsibility; and in later times the crier of the court was usually employed. So that, whilst the issue still had the judgment of the court in their favor, unfortunately for them it was against the wrong person; and virtually their right was defeated, and the estate-tail was said to be *barred*. Not only were the issue barred of their right, but the donor who had made the grant, and to whom the lands were to revert on failure of issue, had his reversion barred at the same time. So, also, all estates which the donor might have given to other persons, expectant on the decease of the tenant in tail without issue (and which estates are called remainders expectant on the estate-tail) were equally

rable incident to an estate-tail. So now as to right to bar by a deed enrolled. Any condition to the contrary is null and void. Wms. on R. P. (47).

§ 40. *Estates-tail in Virginia.*—Upon the first settlement of Virginia (1607), the statute of *De Donis* became part of the law of the Colony, and before the Revolution entails were greatly favored. The colonists also brought with them fines and recoveries as a means of barring entails, but these, by Act of the Assembly in 1705, were abolished, and estates-tail could only be barred by special act of the legislature, though this stringency was somewhat relaxed, as to small estates, in 1734. 3 Hen. Stats. 320; 4 Id. 400. And in 1727 slaves were allowed to be entailed with land. 4 Id. 225. But at the Revolution, so calculated did our ancestors consider estates-tail to sustain the principles of aristocracy, and so variant to the spirit of our institutions, that, instead of tampering with so noxious a plant, they resolved to lay the axe to its root by a total abolition. An act was passed for this purpose on October 7, 1776, but not being quite effectual, another to complete the work was enacted to take effect January 1, 1787. The language of the Code now is: "Every estate in lands so limited, that as the law was on the seventh day of October in the year 1776, such estate would have been an estate-tail, shall be deemed an estate in fee-simple." Code Va. § 2421; 9 Hen. Stats. 226; *Roy v. Garnett*, 2 Wash. 9; 1 Lom. Dig. 31.

It will be remembered that estates-tail are not abolished in England. It is in the *power* of each tenant to bar the entail, but if he chooses he may leave it undisturbed. But in Virginia no estates-tail, however created, can continue

barred. The demandant in whose favor judgment was given became possessed of an estate in fee-simple in the lands; an estate the largest allowed by law, and bringing with it the fullest powers of alienation, as will be hereafter explained; and the demandant, being a friend of the tenant in tail, of course disposed of the estate in fee-simple according to his wishes."

such, the statute operating as one great universal recovery, and docking all estates-tail whatever; those created before its enactment *instante* and *ipso facto*, those created thereafter, from the moment of their commencement. 1 Lom. Dig. (27); *Carter v. Tyler*, 1 Call, 195; *Jiggetts v. Davis*, 1 Leigh, 418-'24.

Though estates-tail cannot now exist in Virginia, since every estate in lands so limited as to be a fee-tail on October 7, 1776, shall be deemed a fee-simple, it is nevertheless necessary to understand the rules by which they were aforetime created,¹ since such limitations will be considered fees-simple. The doctrines which teach the nature of fees-tail, and how created, thus survive the destruction of the estates themselves. 1 Lom. Dig. (20). And this remark is applicable in the United States generally.

For an account of the *status* of estates-tail in America, see 1 Wash. R. P. (84). They are either changed into fees-simple in the tenant himself, as in Virginia, or else the tenant is given an estate for life only, and the fee-simple vests in his issue by way of remainder. In Delaware, however, estates-tail still exist, though they may be barred by

¹ To create a fee-tail by deed, the regular words are, "To A and the heirs of his body." The word "heirs," as a word of inheritance, is indispensable; and it must be coupled with *words of procreation*, either "of the body," or other words of similar import. *Beresford's Case*, 7 Rep. 41. In *Hollingsworth v. McDonald*, 2 H. & J. (Md.) 230 (3 Am. Dec. 545) it is said: "It is established that the words *de corpore suo* are not indispensably necessary, but may be supplied by words equipollent or tantamount, plainly designating or pointing out the body from which the heirs inheritable are to issue or descend." Thus the words "of himself issuing or lawfully begotten"; "of his flesh"; "of his wife begotten"; "which he may happen to have to beget"; are all words of *procreation*, and coupled with the word "heirs," create an estate-tail. But in a grant or feoffment, the words "to A and his seed," or "to A and his offspring," or to A and the issue of his body," are insufficient to confer an estate-tail, and only give A an estate for life, for want of the word "heirs." (Wms. R. P. 144;

deed. *Daniel v. Whartenby*, 17 Wall. 639. 2 Bl. Com. (119) n. 18.

§ 41.—**Limitation of Estates in Fee and in Tail.**—The following summary of the words of limitation sufficient to create a fee-simple or fee-tail, by deed or will, in England and Virginia, formerly and now, may prove useful to the student.

I. In England.—A. *Fee-simple*. (1). *By Deed*. (a). *Formerly*: “To A and his heirs.” (b). *Now*: “To A and his heirs.”

(2). *By will (devise)*. (a). *Formerly*: “To A forever, in fee-simple, etc.” (b). *Now*: “To A.” (Wills Act 1837, 1 Victoria.)

B. *Fee-tail*. (1). *By deed*. (a). *Formerly*: “To A and the heirs of his body.” (b). *Now*: “To A and the heirs of his body.”

(2). *By will (devise)*. (a). *Formerly*: “To A and his issue, seed, etc.”

II. In Virginia.—(Same in the United States generally.) A. *Fee-simple*. (1). *By deed*. (a). *Formerly*: “To A and his heirs.” (b). *Now*: “To A,” by statute taking effect January 1, 1787.

(2). *By will (devise)*. (a). *Formerly*: “To A forever in fee-simple, etc.” (b). *Now*: “To A” (by statute of 1787).

B. *Fee-tail*. (1). *By deed*. (a). *Formerly*: “To A and the heirs of his body.” (b). *Now*: “To A and the heirs of

2 Bl. Com. 115.) Thus in Pennsylvania, in *Foster v. Joice*, 3 Wash. C. C. 498, a conveyance to three Indian chiefs “and their generation, to endure as long as the waters of the Delaware shall run,” was held to pass but a life estate, a decision which must have surprised the “untutored” minds of the grantees. In a *will*, however, the same doctrine of indulgence to testators prevails as to a fee-tail which applies to a fee-simple; and a devise “to A and his issue,” “to A and his seed,” etc., confers a fee-tail. (2 Bl. Com. 115.) In wills, indeed, a fee-tail is frequently *raised by implication*, to effectuate intent, as will be explained hereafter in the chapter on *Executory Interests*.

his body." But since 1776 such fee-tail is at once changed into a fee-simple.

(2). *By will (devise)*. *Formerly and now*: "To A and his issue, seed, etc.," but since 1776 such estate-tail is at once converted into fee-simple.

II. *Freehold Estates not of Inheritance.*

§ 42. **Estate for the Tenant's Own Life.**—As to civil death see 1 Bl. Com. (132). There is no *civil death* in Virginia, and it is necessary to provide against it by limiting the estate during the *natural* life of the tenant. See 2 Bl. Com. (122); 2 Minor's Inst. 90.

§ 43. **Tortious Conveyances.**—A tenant for his own life would at common law forfeit his estate to the remainderman or reversioner, by conveying to another a *larger* estate than he could rightfully convey; as, *e. g.*, an estate for the life of another, in tail, or in fee-simple. But this doctrine of forfeiture was confined to a conveyance by feoffment, fine, or common recovery, and these, because they enabled the tenant to *work a wrong*, were called *tortious* conveyances, whereas conveyances under the statute of uses, such as bargain and sale, lease and release, were called *innocent* conveyances. See 2 Bl. Com. (274). But now in England and Virginia no conveyance can operate tortiously (or by wrong), it being provided by statute that no conveyance shall pass a greater estate than the grantor has the right to convey. Code Va. § 2419; *Elys v. Wynne*, 22 Grat. 224.

§ 44. **Estovers and Emblements.**—For the *incidents* of an estate for life, see 2 Bl. Com. (122). As to the right of tenant for life to *estovers*, see *Miles v. Miles*, 32 N. H. 147; 64 Am. Dec. 362 & n. 367-'68. As to *emblements*, see 64 Am. Dec. 369. Formerly the subject of emblements was regulated in Virginia by statute; but the Code of 1887 declares (§ 2806), "In all cases the right to emblements shall be as at common law." But it is enacted by § 2807 that, "The

tenant who is entitled to emblements, or his personal representative, shall pay a reasonable rent for so much land as the emblements shall occupy, in the same proportion as it shall bear in quantity and value to the entire premises; and such rent shall be apportioned among the owners of the reversion, if there be more than one, according to their respective interests." And § 2808 enacts: "If any land has been prepared by the tenant previous to the expiration of the lease, for the purpose of putting a crop into the ground, under such circumstances as would have entitled the tenant, or his personal representative, to emblements, if the crop had been put in, those who succeed to the land shall pay a reasonable compensation for such preparation." Whether the tenant shall pay rent for the premises occupied by the emblements is doubtful at common law; § 2807 settles it in favor of the landlord. And at common law the mere preparation of the soil for crops will give the tenant no right to emblements, if they have not been actually sown or planted when his estate terminates; § 2808 allows reasonable compensation to the tenant in this case.

§ 45. Lessees of Tenants for Life.—As to the privileges of the under-tenant, or lessee, of a tenant for life, see 2 Bl. Com. (123). By Code, Virginia, § 2809, it is enacted: "If there be tenant for life or other uncertain interest in land which is let to another, upon the determination of such life or other uncertain interest the lessee may hold the land to the end of the current year of the tenancy, paying rent therefor; the rent, if it be reserved in money, shall be apportioned between the tenant for life or other uncertain interest, or his personal representative, and those who succeed to the land." For rent reserved in kind a special provision is made, for which see § 2809. But suppose the lessee does not choose to hold the land to the end of the current year? It is then provided by Code of Virginia, § 2810, "on the determination, by death or otherwise, of the estate or other thing, from or in respect of which any rent, hire, or money, coming due at fixed periods,

issues, or is derived, or on the death of any person interested in such rent, hire, or money, the person, or the personal representative or assignee of the person, who would have been entitled, but for such death or determination, to the rent, hire, or money coming due at any such period, shall have a proportion thereof, according to the time which shall have elapsed of the time for which the said rent, hire, or other money was growing due, including the day of such death or determination, deducting a proportional part of the charges."

§ 46. **Waste.**—For the general doctrines, see 2 Bl. Com. (281) to (284); Bisph. Eq. §§ 429–435. In general, the law in the United States is the same as in England, with some modifications growing out of the difference between an old and a new country. Thus, the cutting of timber is waste in England if it go beyond the right to reasonable estovers; but in the United States the clearing of land for cultivation may be a necessity, and for the benefit of the inheritance, and so not waste when done by a tenant. See *Findlay v. Smith*, 6 Munf. (Va.) 134 (8 Am. Dec. 133); *Owen v. Hyde*, 6 Yerger (Tenn.) 334 (27 Am. Dec. 467). Again, converting meadow into pasture by life-tenant is waste in England, but not so in Rhode Island, unless detrimental to the inheritance, and contrary to the ordinary course of good husbandry. *Clemence v. Steere*, 1 R. I. 272 (53 Am. Dec. 621). But in *University v. Tucker*, 31 W. Va. 621, it is held that taking clay from the soil by a life-tenant, and manufacturing it into bricks, and selling them, is waste, the court saying: "According to all the authorities this is waste. It is taking the very substance of the inheritance. There is no evidence that brick was made on the land in the life-time of the testator. In *Smith v. Rome*, 19 Ga. 89, it was held to be waste to take rock from land for the purpose of paving the streets of a city. The life-tenant cannot cut turf on bog lands for sale. 1 Co. Litt. 54 b. He cannot dig for gravel or lime, clay, brick, earth, stone, or the like, except for repairs of the buildings, or the manuring of the lands. *Dickinson v. Jones*, 36 Ga. 97. The

life tenant has the usufruct of the land. He can enjoy the annual produce of the land during life, but he must not do any damage to the absolute property in the remainderman."

There is now no forfeiture in Virginia for waste, but if it be found by the jury that the waste was committed wantonly, judgment shall be for three times the amount of the damages assessed therefor. Code Va. § 2778.

§ 47. 2. **Estate for the Life of Another than the Tenant.** (*pur autre vie.*)—For the doctrine of general and special occupancy, see 2 Bl. Com. 258. Neither kind of occupancy now exists in Virginia, it being provided by statute that "any estate for the life of another shall go to the personal representative of the party entitled to the estate, and be assets in his hands, and be applied and distributed as the personal estate of such party." Code Va., § 2653.

§ 48. 2. **Estate-tail after the Possibility of Issue Extinct.**—(See 2 Bl. Com. 124.) This estate does not now exist in Virginia, every estate-tail becoming a fee-simple immediately on its creation. *Orndoff v. Turman*, 2 Leigh (Va.) 200; *Outland v. Bowen*, 115 Ind. 150 (7 Am. St. Rep. 420).¹

¹ The estates for life arising out of the relation of husband and wife—Dower, Curtesy, and Jointure—will be treated of hereafter in a separate chapter, as some of the doctrines cannot be well understood until after the discussion of remainders, conditions, and other topics.

CHAPTER IV.

ESTATES LESS THAN FREEHOLD.

I. *Estate for years.*

§ 49. **An Estate for Years Distinguished from an Interesse Termini.**—"Tenant for term of years is where a man letteth lands or tenements to another for a term of certain years after the number of years that is accorded between lessor and lessee; and when the lessee *entereth* by force of the lease, then is he *tenant* for term of years." Litt. § 58; 1 Tho. Co. 628; 2 Bl. Com. (144). The lessee for years does not acquire an *estate* in the demised land until he *enters* thereon; the lease of itself gives him only the *right of entry* on the land, which right is called his *interest in the term*, or *interesse termini*. Tied. R. P. § 174. And before entry by the lessee on the land, no *release* of the reversion can be made to him by the lessor. Thus, if A leases Blackacre to B for one year, and then, before B enters on the land, releases to him the reversion, the release is void. The importance of this doctrine will be seen hereafter with reference to deeds of lease and release.

§ 50. **Words Proper to Create a Lease.**—The ordinary and most formal words are "demise, lease and to farm let"; but any words, whether they are in the form of a license or agreement, which indicate the *intention* of the parties that one shall divest himself of the possession, and that the other shall come into it *for a certain time*, will, in construction of law, amount to a lease.¹ And as to the *certain time*, it is enough that there

¹ WHAT CONSTITUTES A LEASE.—"A lease for years is a contract between lessor and lessee for possession and profits of lands, etc., on the one side, and a recompense by rent, or other consideration, on the other." (5 Bac. Abr. 433; *Thomas v. R. Co.*, 101 U. S. 71,

is a limit (*terminus*) beyond which the lease *cannot* extend, though it is liable to end at any time, and before the limit is reached. Thus, "To A for 100 years, if he shall so long live," gives A a term of years (chattel real), because the lease *cannot* extend beyond the 100 years, though it may end at any time by A's death; and this although it may be certain that it cannot reach the limit, and so will surely end at A's death, and not by efflux of time. See 2 Bl. Com. (143).

78.) The above definition is faulty in not stating that a lease for years is for a *determinate period*.

No set form of words is necessary to constitute a lease. (*Michie v. Wood*, 5 Rand. (Va.) 571; *Upper Appomattox Co. v. Hamilton*, 83 Va. 319.) "Very frequently it is a matter of great difficulty to determine whether the agreement under which the tenant holds is technically a lease or a license. The decisions on this subject are numerous and extremely difficult to reconcile." *Hanks v. Price*, 32 Grat. 107, 110, per Staples, J. See *Barksdale v. Hairston*, 81 Va. 764; *Hodgson v. Perkins*, 84 Va. 706.

For examples of what are called "mining leases," see *Cowan v. Radford Iron Co.*, 83 Va. 547; *Deaton v. Taylor*, 90 Va. 219; *Young v. Ellis*, 91 Va. 297; *Shenandoah Land, etc., Co. v. Hise*, 92 Va. 228. As to agreements for the cultivation of land on shares, see note to *Puinam v. Wise* (N. Y.), 37 Am. Dec. 317-323. In 4 Am. & Eng. Enc. of Law (1st ed.), 895, it is said, "That when a farm is let out on shares it depends upon the stipulations of the contract, and the intention of the parties, whether they are tenants in common or partners, or whether the relation of landlord and tenant, or of master and servant, exists; and the rights of the parties to the crops raised are determined accordingly."

For a case in which the contract between the parties as to land, whereby they became for the period of a year associated in the tillage thereof, constituted them *joint tenants of the crop of corn raised*, see *Lowe v. Miller*, 4 Grat. 196; cited in *Hanks v. Price*, 32 Grat. 107. In *Lowe v. Miller* the alleged lessor was not the owner of the land, but acted under a license from the owner, and the court held that the agreement between the parties "could not be treated as a lease, rendering rent in kind, inasmuch as the reservation of one-half of the crop was not incident to the reversion, and consequently gave no right of distress."

In *Reynolds v. Pool*, 84 N. C. 37 (37 Am. Rep. 607), the following contract was held to make the parties *partners*: "On the

§ 51. Actual Lease Distinguished from a Contract to Lease.

—See Tied. R. P., § 179. The fact that no particular words are required for actual leases often renders it difficult to say whether the words that are used create an *actual present lease*, or merely amount to a *contract to create a lease in future*. “As the law stands with us, the whole question resolves itself into one of construction, and an instrument will be construed

first Monday in February, 1878, I agreed with McPheeters to farm for the year 1878 on these terms: He was to furnish the outfit and the land. I was to hire hands, and superintend the making of the crop. He was to provide money to pay the hands and carry on the business; for one-half of which, as well as for the like proportion of the hire and cost of feeding the mules and horses, he was to be repaid by having the amount applied in reduction of his indebtedness to me previously incurred, and we were to divide the profits.” In the note to this case it is said: “The contract in this case seems an exception to the usual contract in cases of working farms on shares. Generally the contract is to share the *produce*, and this does not constitute a partnership. But here the agreement was to share the *profits*, and not explicitly as compensation. Sharing profits as such, and not as compensation, may constitute a partnership.”

In *Parrish v. Commonwealth*, 81 Va. 1, it is held that under the contract between Parrish and Mitchell, the latter was a mere employe or cropper, and no tenant. Parrish employed Mitchell to cultivate and secure the crops on his farm during the current year, and agreed to pay him in part—one-half—of the crops, instead of money, for his labor and services. Mitchell was entitled to nothing until Parrish had been fully reimbursed, out of Mitchell's share of the crop, for whatever Mitchell might owe him for supplies or otherwise. The court said that the arrangement was only a mode of paying for Mitchell's labor, and that before a settlement and division, Mitchell had no interest in the corn and other crops. And the court cited this language, with approval, from *State v. Gay*, 1 Hill (S. C.), 304: “One who is entitled to a share of the crop for his services on the plantation of another is not a joint tenant nor tenant in common with his employer in the crop produced. It is exclusively the property of the employer, though he has made an executory contract to allow a certain portion of it to the cropper; and the latter may commit larceny in stealing a part of the gathered crop.” And see *McCutchen v. Crenshaw* (S. C.), 19 S. E. 140.

as a lease, or as merely an agreement for a lease, according to what appears to be the paramount intention of the parties." Taylor, Landlord and Tenant, § 38. The distinction is important, for it may happen that what was intended by the lessor as a mere *agreement* for a future lease may really amount to an *actual present lease*, and thereby the lessee may escape *covenants* which would have been imposed on him if the negotiation had amounted to no more than an agreement, and had required to be perfected by an actual lease, just as a contract to sell land in fee-simple requires to be consummated by a *deed of conveyance*. So where there is an actual lease, com-

But it must not be supposed that an agreement for the cultivation of land on shares may not amount to a lease, creating between the parties the relation of landlord and tenant. See 37 Am. Dec. 319, where it is said: "In a large number of cases it is laid down in unmistakable terms that if in a contract for the cultivation of land on the shares there are clear words importing a present demise, or that the occupier is to have the exclusive possession of the land, or that he is to pay or deliver the owner's portion of the crops as rent, the relation between them is that of landlord and tenant." And see *Ib.*, p. 320, where it is said: "A 'cropper' is thus defined in *Fry v. Jones*, 2 Rawle (Pa.), 11: 'If one hires a man to work his farm and gives him a share of the produce, he is a cropper. He has no interest in the land, and receives his share as the price of his labor.' That is to say, if the general possession of the land remains in the owner, and the occupant cultivates it for a share of the produce as compensation, he is a cropper. The question, then, in every case of cultivation of land on the shares is, Does the contract give the owner his share as rent, or the occupant his share as compensation? If the former, according to the cases above cited, the occupant is a tenant; if the latter, he is a cropper." And see 4 Am. & Eng. Enc. of Law, 897, where it is said: "Where the owner parts with his entire possession of the land to his lessee or tenant, and is to receive his half by way of rent in kind, the relation of tenants in common does not exist, but it is that of lessor and lessee. The lessor has no right to disturb the lessee in his possession, or to interfere with or take his [the lessor's] half; for the possession of the land being in the lessee, the property in the crop must necessarily follow the interest in the land until the time for division."

pleted by the lessee's entry, he has a *legal title* for the term, and can resist an action of ejectment brought against him by the lessor, which would not be the case if there was merely an agreement for a lease. *Price v. Williams*, 1 M. & W. 6.¹

§ 52. Creation of Leases for Years.

A. In England.

(1). At common law.

(a). *Actual lease*. By *verbal* agreement between lessor and lessee, followed by the lessee's entry upon the land. No writing required.

¹ AGREEMENT FOR A LEASE.—In *Upper Appomattox Company v. Hamilton*, 83 Va., 324, it is said: "The language of the instrument is certainly peculiar, and it is not easy to determine from its terms whether a lease, or merely an agreement to lease, was intended. No set form of words, however, is necessary to constitute a lease, and in doubtful cases, like the present, the nature and effect of the instrument must be determined in accordance with the intention of the parties, as such intent may be collected from the whole instrument." And in *Wms. R. P.* (17th ed.) 561, it is said: "The Act of 1845 (8 and 9 Vict., c. 106, § 3), to amend the law of real property, provided that a lease required by law to be in writing [by the statute of frauds] of any tenements or hereditaments shall be void *at law*, unless made by deed. But such a lease, although void as a lease for want of its being by deed, may be good as an agreement to grant a lease, *ut res magis valeat quam pereat*. . . . It does not require any formal words to make a lease for years. The words commonly employed are 'demise, lease, and to farm let'; but any words indicating an intention to give possession of the lands for a determinate time will be sufficient. Accordingly, it sometimes happened, previously to the act of 1845, that what was meant by the parties merely as an agreement to execute a lease, was in law construed as itself an actual lease; and very many lawsuits arose out of the question whether the effect of a memorandum was in law an actual lease, or merely an agreement to make one. Thus, a mere memorandum in writing that A agreed to let, and B agreed to take a house or farm for so many years, at such a rent, was, if signed by the parties, as much a lease as if the most formal words had been employed. By such a memorandum a term of years was created in the premises, and was

(b). *Agreement* for a lease, as distinguished from a present actual lease. Verbal agreement, no writing required.

(2). Under Statute of Frauds (29 Car. II.)

(a). *Actual lease*. If not exceeding three years, and if two-thirds of the annual value of the land be reserved as rent, then by word of mouth, without writing. But if for more than three years, or if less than two-thirds of the annual value be reserved as rent, then by writing signed. (See §1 of Statute of Frauds.) But now by 8 and 9 Vict. c. 106, § 3 (1845), "a lease required by law to be in writing of any tenements or hereditaments shall be void at law unless made by deed."

(b). *Agreement* for a lease. This is an *interest in or concerning land*, and so comes under § 4 of the Statute of Frauds, and requires writing signed in all cases.

B. *In Virginia*.

(1). At common law. Same as in England.

(2). *By statute*.

(a). *Actual lease* (Code of Va. § 2413). If for *more than five years*, then by *deed*; but if for *five years or less*, then by word of mouth. See 2 Min. Ins. (4th ed.) 185. There is no decision on this point in Virginia, but the above is believed to be the law.

(b). *Agreement* for a lease. If for more than one year, then by writing signed; for one year or less, by word of mouth. Code of Va. § 2840.¹

vested in the lessee immediately on his entry, instead of the lessee acquiring, as at present, a right to have a lease granted to him in accordance with the agreement." See *Swain v. Ayres*, 21 Q. B. Div. 289. In *Marshal v. Berridge*, 19 Ch. D., 233, it was held that an executory agreement for a lease does not satisfy the statute of frauds unless it can be collected from it on what day the term is to begin; and there is no inference that the term is to commence from the date of the agreement, in the absence of language pointing to that conclusion.

¹ CREATION OF LEASES IN VIRGINIA.—In *Burruss v. Hines* (Va.), 26 S. E. 875 (S. C. 3 Va. Law Reg. 130), it is assumed (though

§ 53. **Rents Reserved Upon a Lease.**—The law recognizes three kinds of rent, viz.: (1) *Rent services*; (2) *Rent charge*; and (3) *Rent seck*. And besides rents *reserved* upon a lease of land, there are also rents *granted* out of land, which may be *rent charge* or *rent seck*, but cannot be *rent service*. *Rent service* is the return of the vassal made the lord for the land he held of him. This was, therefore, *incident to tenure* and of feudal origin. And for rent service not paid or rendered

not necessary to the decision in the case), that an *agreement* for a lease *for one year* is unenforceable, if the lease is to begin at a future date. Thus, if on the first day of January A makes a verbal agreement to rent certain premises to B for one year from the first of February following, the agreement would be invalid, and no action could be brought thereon.

If this view be correct, as the agreement is not for the lease of real estate "for more than one year," it must be by reason of Code of Va. § 2840, cl. 7, which declares that no action shall be brought "upon any agreement that is not to be performed within a year"; "from the making thereof," being added as the meaning of the statute. And this doctrine is sustained by the weight of authority. See 17 Am. St. Rep. 752-'57, note to *Wallace v. Scoggins*, 18 Or. 502, where the cases are collected. And see the article by Prof. E. H. Bennett, "Agreements not to be Performed within one Year," 29 Am. Law Review, 481, 484 (reprinted in 1 Va. Law Reg. 553.) See, also, 12 Am. & Eng. Enc. Law, p. 978, and note.

The conflict of decisions disclosed by the cases cited by the authorities referred to above is due to diversity of opinion on the question whether an agreement to give a verbal lease for one year, to begin at a future date within one year, is capable of being fully performed, on the part of the lessor, within one year. For the statute does not require performance on both sides within one year. See *Seddon v. Rosenbaum*, 85 Va. 928, following the leading English case of *Donelian v. Read*, 3 B. and Ad. 809. On the one hand it is contended that such an agreement is fully performed by the lessor's merely giving the lease, which can be done within one year; on the other, it is claimed, that in order to the full performance of his agreement by the lessor, he must actually permit the tenant to occupy for the term stated, which, of course, could not be within one year, when the lease for a year is to begin at a future date.

when due, the lord (now landlord) may *distrain* the goods and chattels of the tenant, as of common right, and without any agreement to that effect. Hence the *right of distress* is *incident* to rent service; and this distinguishes rent service from rent charge, as to which the right of distress exists *by express stipulation*, and from rent seck, as to which it *does not exist at all*.

§ 54. **The Effect of Quia Emptores on Rents.**—Before this statute which abolished *subinfeudation* on grants of the entire fee-simple, if A enfeoffed B of land, reserving rent, the rent was *always* rent service. For before the statute, whether A conveyed his entire estate (fee-simple), or any smaller estate carved out of it (in-tail, for life, or for years), there was *tenure* between A and B (feoffier and feoffee), and the

Upon principle, it would seem that the lessor does fully perform his agreement by giving the tenant the lease, and this may be (and is to be), in the case stated, within one year. A failure to give the lease at the day named would be a breach of the lessor's contract; and if on that day the lease is given, any subsequent interference with the tenant's possession by the landlord would simply be an act of trespass. As for wrongful intrusions by third persons, the tenant must take care of himself. And if it be said that there is an implied warranty of quiet enjoyment on the part of the lessor, the reply is that this may be performed (if the occasion arise) within one year; but aside from this, that such obligation, imposed by law, would no more make the lessor's agreement invalid as not capable of performance within one year, than would the implied warranty of title attached to the sale of a chattel make the verbal agreement to sell in one month unenforceable. As said by Gray, in *Viterbo v. Friedlander*, 120 U. S. 712, the common law regards a lease as the grant of an estate for years, in which the lessee takes a title. It is true that a contract of personal service for one year to begin in future is within the Statute of Frauds (*Lee v. Hill*, 87 Va., 497; but here there is the continuous duty of giving and receiving services.

It is stated in the text, following Professor Minor, that an actual lease in Virginia, for five years or less, can be made by word of mouth. Such an actual lease is not a *contract* for the

rent being *incident to the tenure* was *rent service*. And it mattered not that A had *no reversion*. Though A enfeoffed B in fee-simple (to B and his heirs), A had a *seignory*, and to this the rent and fealty were incident. This was the time of the creation of *manors*, before the year 1290. But after *quia emptores*, tenure was abolished between A and B, if A granted to B his entire fee-simple; and B held not of A, but of A's lord. Hence, the rent reserved between A and B could not be *incident to tenure*, and so could not be *rent service*. If the land was by express stipulation *charged* with a right of distress, the rent was called *rent charge*; if not so charged, the

lease of real estate, and so does not require writing under Code of Virginia, § 2840, cl. 6; and the *estate* created thereby does not require to be by deed by § 2413, because by supposition it is not for a term of more than five years. It would seem, therefore, to be effectual to all intents and purposes, as coming within § 2413 as to conveyances, and not at all affected by the provisions of § 2840, which refer only to promises, contracts, agreements, etc. In no view, therefore, could it be called an "agreement not to be performed within a year." But under the English Statute of Frauds, in the corresponding case of an actual lease not exceeding three years, upon which a certain rent is reserved, it was held that the case was not entirely without the operation of § 4 of the statute; that "the leases are valid, and what remedy can be had upon them in their character of leases may be resorted to; but they do not confer the right to sue the lessee for damages for not taking possession." See *Inman v. Stamp*, 1 Starkie, 12; *Edge v. Strafford*, 1 C. and J., 391; *Lord Bolton v. Tomlin*, 5 Ad. and E., 856; *Wright v. Stavert*, 2 E. and E., 721; *Smith on Cont.* (108).

As to the effect of an *actual* lease for one year, made verbally to begin at a future date, see *Young v. Dake*, 5 N. Y. 463; *Becar v. Flues*, 64 N. Y. 518; *Whiting v. Ohlert*, 52 Mich. 462 (50 Am. Rep. 265), where such a lease was sustained. *Querre*, under the Virginia statute, as to the effect of an actual lease made verbally, for five years or less, to begin *in futuro*.

In 2 Lom. Dig. (93), the Virginia statutes are quoted, and it is said, disregarding the distinction between an actual lease and an agreement for a lease: "It would seem, therefore, that a mere parol, unwritten demise for a year will be valid; or a written demise for five years or less; but a demise beyond five

rent was called *rent seck* (dry rent) because lacking the *best* remedy for its recovery—the right of distress.

Since *quia emptores*, the doctrine is established that *tenure is incident to reversion*. Hence, since rent service is incident to the tenure, *rent service is incident to the reversion*. Rents, therefore, which are reserved to grantors, or assignors, who convey their *entire* interest in land, cannot be rent service, but become rent charge, or rent seck, as explained above.¹

§ 55. **Rents Granted Out of Land.**—We have seen the effect of *quia emptores* on rents *reserved* on grants of land. But rent may be granted out of land, the grantee taking the rent only, and the grantor retaining the land. These granted rents obviously cannot be *rent service*, for there is no *tenure* between the grantor and grantee of a rent.

Hence, such rent is *rent charge*, if the land out of which it is granted is *charged* with the right of distress; and rent seck if it is not so charged. This sort of rent charge and rent seck existed prior to *quia emptores*, and was not affected by that statute. Such a rent charge is in common use now in England as a part of the machinery of marriage settlements, the land

years must be by deed." And considering the unsettled state of the law in Virginia, and the difficulty of distinguishing between an actual contract of lease, and an executory agreement for a lease, it is the part of prudence to reduce to writing all contracts for the possession of land for more than one year, and also all such contracts for one year only, since the operation of the lease is often postponed until a day subsequent to its date.

¹ **RENT SERVICE IN VIRGINIA.**—Although there is no tenure in Virginia (see *ante*, § 7, note 1), yet the consequences of tenure, which were interwoven with the common law, still continue as to rents, and determine what is, and what is not, rent service. And though *quia emptores* was abolished in Virginia in 1792, it is not considered that the common law was thereby restored; but the doctrine still continues that rent service is incident to the reversion. (1 Tuck. Com. Bk. 2 (18); Wms. R. P. 118, note; *Wallace v. Harmstead*, 8 Wright, 492, overruling *Ingersoll v. Sergeant*, 1 Whart. 337; *Lowe v. Miller*, 3 Grat. 196.)

being settled on the eldest son to be born of the contemplated marriage, subject to a rent charge in favor of his (prospective) brothers and sisters. There are, therefore, now in England *two* kinds of rent charge and rent seek, viz.: that arising on grants of rent out of land, which is unaffected by *quia emptores*; and that arising when the grantor of land reserving rent has *no reversion*, which kind is created by *quia emptores*.

§ 56. **Right of Distress in Virginia.**—In Virginia the right of distress is now given by statute as to all rents alike, without express stipulation. Code of Va. § 2787. This had been done in England by 4 Geo. II., chap. 28. And in Virginia the distress may be levied on any goods of the lessee, or his assignee, or under-tenant found on the premises, or which may have been removed therefrom not more than thirty days. Code of Va., § 2791; *Hutchins v. Commercial Bank*, 91 Va. 68. At common law, all goods on the leased premises, whether the tenant's or a *stranger's*, were liable to be distrained on for rent; while, on the other hand, no distress could be levied on the *tenant's* goods unless they were *found on the leased premises*.¹ *Clarke v. Millwall Dock Co.*, 17 Q. B. D. 494.

¹ DISTRESS FOR RENT.—See on general subject, note to *Lichtenthaler v. Thompson* (Pa.), 15 Am. Dec. 584-'88. For the measure of damages under Code of Va., § 2898, when property is "distrained for any rent not due," see *Fishburne v. Engledove*, 91 Va. 548. And by § 2791, it is provided: "If the goods of such lessee, assignee or under-tenant, when carried on the premises, are subject to a lien which is valid against his creditors, his interest only in such goods shall be liable to such distress. If any lien be created thereon while they are upon the leased premises they shall be liable to distress, but not for more than one year's rent, whether it shall have accrued before or after the creation of the lien." For the construction of this statute, see *City of Richmond v. Duesberry*, 27 Grat., 210; *Wades v. Figgatt*, 75 Va., 575; *Upper Appomattox Co. v. Hamilton*, 83 Va., 319. For procedure when goods are distrained for rent reserved in a share of the crop, see Code of Va., § 2795.

§ 57. **Out of What May Rent be Reserved.**—Blackstone says out of lands and tenements *corporeal* whereunto the owner (landlord) may have recourse to distrain. 2 Bl. Com. (41). And he adds that an annual sum reserved on the grant of an *incorporeal* hereditament, though recoverable in an action, is merely a personal contract, and not *rent*, because could be no remedy by *distress*, if it was in arrears. And so no rent, *eo nomine*, and with right of distress, can be reserved on the grant of a *chattel*. And yet there may be a *personal contract* as before. But it seems that in one sense rent may be said to issue out of incorporeal realty, or out of personalty. As to the peculiar remedy by *distress*, it can only issue out of *land*; but in point of *render* or return, it may be considered to issue out of incorporeal tenement, as a common, or out of personal chattels. Thus in *Newton v. Wilson*, 3 H. and M. (Va.) 470, a mill was leased out, together with a negro miller, reserving rent. But the negro was, in fact, a free man, and evicted himself by title paramount. It was held that the rent abated according to the value of the negro's services, which shows that *in point of render, the rent was supposed to issue out of both mill and miller*, though in point of *remedy* the whole sum stipulated to be paid was to be taken as rent issuing out of the real estate. See *Mickie v. Wood*, 5 Rand. 572.

§ 58. **Mode of Reserving Rent.**—The best way to reserve rent is to make it payable *during the term*, without saying to whom. This method is recommended by Lord Coke, and is adopted in the form of lease given in the Code of Virginia, § 2440. The rent will then *follow the reversion*, and will go to the lessor's heir or administrator accordingly. For the questions which arise when rent is reserved otherwise than "during the term," see 2 Tuck. Com. (25); Taylor L. and T., § 156.

§ 59. **When is Rent Due.**—In general, rent is not due until after midnight of the day on which it is made payable. A

distress, therefore, at any time *on the day* on which rent is payable would be premature; nor would an action lie for rent until the next day. Taylor L. and T., § 391. But when it is necessary to make a demand for rent in order to enforce a condition of *re-entry* for its non-payment, the demand must be made for the precise sum due, on the day it is payable, before sunset on that day, on the premises and at the most notorious place thereon, or if there be a dwelling-house, at the front door thereof. See Tied. R. P. § 193. And this rule as to the necessity for demand remains unaltered in Virginia, whenever the lessor desires, by re-entry, to enforce a condition of *forfeiture* for non-payment of rent. See *Johnson v. Hargrove*, 81 Va., 118. But if an action of *ejectment* be brought in such cases, it is provided by the Code of Virginia, § 2796, that the service of a declaration upon the tenant in possession shall be in lieu of a demand and re-entry. But this applies to an action of ejectment only, and not to an action of *unlawful detainer*. See to this effect, *Johnston v. Hargrove*, 81 Va., 118. For *relief* against forfeiture of his term by the tenant, for non-payment of rent *at the day set*, see Code of Virginia, § 2797 and § 2800. As to forfeiture by tenant, see further *Guffy v. Hukill*, 34 W. Va., 49; *Hukill v. Meyers*, 36 W. Va., 639; *Clator v. Otto*, 38 W. Va., 89; *Henderson v. Carbondale, etc., Co.*, 140 U. S. 25.

§ 60. On the Lessor's Death to Whom is the Rent Payable?

—The general principle is, that rent *due* on the lessor's death goes to the lessor's personal representative (executor or administrator) like any other *debt*; but rent not due on the lessor's death *follows the reversion*, *i. e.*, it goes with the land, and whosoever is entitled to it receives the rent also as incidental. As to rent not due on lessor's death see the following three cases:

(a). A, seised in fee, leases to B for twenty years, reserving the rent, and dies during the term. The reversion in fee passes to A's *heir*, and he is entitled to the rent. *Lightner v. Speck*, (Va.), 28 S. E., 326.

(b). A, possessed of a term of 100 years, subleases it to B for 20 years, reserving rent, and dies during the term. The reversion in the term of 100 years passes to A's *personal representative*, and he is entitled to the rent.

(c). A, possessed of an estate for his own life, leases to B for 20 years, reserving rent, payable quarterly, beginning on January 1. A dies on March 1, a month before the quarter's rent becomes due. Here A's estate ends by his death, and there is no reversion for the rent to follow; and, at common law, B could quit the premises and pay no rent to anybody for the two months from January 1 to March 1. This was changed in England by statute, requiring B to pay to A's personal representative the proportion of the rent for two months.

In Virginia, Code, § 2809, provides that B may hold the land to the end of the current year of the tenancy, paying rent therefor; and if paid in money, the rent shall be apportioned between the reversioner and the personal representatives of A. See also Code of Va., § 2810.

§ 61. Apportionment of Rent.

(a). If the tenant is evicted by a stranger, with title paramount, of *all* the land demised, he is excused from the payment of any rent except that already due before eviction. But if he is evicted by a stranger from *part* of the land only, the rent is *apportioned*, and he must pay rent for the residue of the land.

(b). If the tenant is ousted *by the lessor himself* from the whole, or *any part* of the land demised, all rent not due is extinguished as to all the land. This, when the tenant retains part of the land, is by way of *forfeiture* for the lessor's wrong. See *Briggs v. Hall*, 4 Leigh, 484; *Tunis v. Grandy*, 22 Grat. 109. See further as to rights of tenant when evicted or disturbed by landlord, 38 Am. St. Rep. 485; *Robrecht v. Marling*, 29 W. Va. 765; *Hubble v. Cole*, 85 Va. 87 (S. C. 88 Va. 236).

(c). If a tenant loses a leased house without fault or

negligence on his part, by fire, flood, etc., during the term, there was at common law no abatement of the rent, and the tenant was compelled to continue to pay the whole rent during the whole term. See *Taylor L. and T.*, § 376; 94 Am. D. 662.¹ But now Virginia, by statute, taking effect May 1, 1888 (Code of Va., § 2455), it is provided, that in case of such destruction by fire or otherwise, without fault or negligence on the part of the tenant, there shall be a "reasonable reduction of the rent for such a time as may elapse until there be again upon the premises buildings of as much value to the tenant for his purposes as what may have been so destroyed." And the same doctrine now applies in Virginia when the tenant is deprived of the possession of the premises by the public

¹ In *Viterbo v. Friedlander*, 120 U. S. 707, 712, it is said by Gray, J.: "The common law and the civil law concur in holding that in the case of an executed sale, a subsequent destruction of the property from any cause is the loss of the buyer. *Res perit domino*. They also concur in holding that performance of an executory obligation to convey a specific thing is excused by the accidental destruction of the thing without the fault of the obligor before the conveyance is made. But as to the nature and effect of a lease for years, at a certain rent which the lessee agrees to pay, and containing no express covenant on the part of the lessor, the two systems differ materially. The common law regards such a lease as the grant of an estate for years, which the lessee takes a title in, and is bound to pay the stipulated rent for, notwithstanding any injury by flood or fire or external violence, at least unless the injury is such a destruction of the land as to amount to an eviction, and by that law the lessor is under no implied covenant to repair, or even that the premises shall be fit for the purposes for which they are leased. The civil law, on the other hand, regards a lease for years as a mere transfer of the use and enjoyment of the property, and holds the landlord bound, without any express covenant, to keep it in repair and otherwise fit for use and enjoyment for the purpose for which it is leased, even when the need of repair or unfitness is caused by inevitable accident; and if he does not do so, the tenant may have the lease annulled or the rent abated." See *Thompson v. Pendell*, 12 Leigh (Va.), 591; *White v. Buchanan*, 76 Va. 546.

enemy. Code, § 2455; *Scott v. Scott*, 18 Grat. 150, 175. And it is also enacted that no covenant by a lessee that he will "leave the premises in good repair" shall bind him, if the buildings thereon are destroyed without his fault, to erect such buildings again, unless there be other words showing it to be the intent of the parties that he should be so bound. Code, § 2453. For the harsh rule of the common law, see *Ross v. Overton*, 3 Call 308; *Maggort v. Hansbarger*, 8 Leigh (Va.), 532.

§ 62. **Covenants in a Lease.**—The usual covenants in a modern lease are said to be: (1), On the part of the lessor, (*a*), for the lessee's quiet enjoyment, (*b*), against encumbrances, (*c*), for further assurance, (*d*), to keep the premises in repair; (2), and on the part of the lessee, (*a*), to pay the rent, (*b*), to pay the taxes and assessments, (*c*), to keep the premises insured, (*d*), to reside on the premises, (*e*), not to carry on certain trades on the premises, (*f*), not to assign or sublet the premises, etc. And some covenants are *implied* by law, in the absence of express stipulation. Thus, the lessor, from the use of the word *demise*, etc., impliedly warrants *quiet enjoyment*. *Scott v. Rutherford*, 92 U. S. 107. And when the lease is silent on the subject, the law imposes on the lessor the duty to pay the taxes and assessments, and if the tenant is compelled by the authorities to pay them, he may set off the amount against the landlord's claim for rent. 12 Am. and Eng. Ency. Law, 692. On the other hand, the law implies a duty on the part of the tenant to keep the premises in repair, and a failure to do so is *permissive waste*. *Kline v. McLain*, 33 W. Va. 32; *Hoyleman v. R. Co.* Ib. 489.¹

¹ **LIABILITY OF TENANT FOR PERMISSIVE WASTE.**—It is certain that there is no implied covenant on the part of the landlord to keep the premises in repair during the term; nor is there any implied warranty by the landlord that a building leased is safe, or that it is suitable for the tenant's purposes. In *Sutton v. Temple*, 12 M. & W. 52, 63, Baron Parke said: "With respect to the other and principal question in this case, whether a con-

§ 63. **Do Covenants in a Lease Bind the Assignee or Sub-lessee?**—An assignment is the transfer of the lessee's *whole* estate to the assignee; a sub-lease is the transfer of *less* than the lessee's whole estate, leaving in him a reversion, and creat-

tract or a condition is implied by law, on the demise of the land, that it shall be reasonably fit for the purpose for which it is taken. . . . The word 'demise' certainly does not carry with it any such implied undertaking; the law merely annexes to it a condition that the party demising has a good title in the premises, and that the lessee shall not be evicted during the term." And in *Ward v. Fagin*, 101 Mo. 669 (20 Am. St. Rep. 650), it is held, in accordance with all of the authorities, that a landlord is not bound to keep the leased premises in repair, nor is he responsible to the tenant for the injuries resulting to the latter from their non-repair. See 12 Am. & Eng. Ency. Law, 723, 1103; 50 Am. Dec. 776-'83, note; 38 Am. St. Rep. 477, note; 52 Id. 884, note.

On the other hand, there are many cases which sustain the doctrine of the text, that the law implies a duty on the part of the tenant to keep the premises in repair, and that a failure to do so is permissive waste. See 2 Min. Ins. (4th ed.) 614; 12 Am. & Eng. Ency. Law, 721; 95 Am. Dec. 121, note; *Windon v. Stuart* (W. Va.), 28 S. E. 776. But when it is asked *what repairs* must the tenant make, and what amounts to permissive waste, it is difficult to obtain a satisfactory answer from the cases. This is, doubtless due to a growing tendency to relieve the tenant from liability for non-repair. Indeed, it has recently been decided in England (contrary to the former opinion), that a tenant *for life* is not liable for permissive waste at all (*Cartwright v. Newman*, 41 Ch. D. 532); and in a note to the seventeenth edition of Williams on Real Property, p. 565, it is said by the English editor: "The old opinion was that a tenant for years was liable for permissive as well as voluntary waste. Litt. § 71. But in modern times, conflicting opinions have been expressed on this point. *Herne v. Bembow*, 4 Taunt. 764; *Yellowly v. Gower*, 11 Ex. 293-'94; *Woodhouse v. Walker*, 5 Q. B. D. 499, 503; *Re Cartwright*, 41 Ch. D. 532. As we have seen, it has now been decided that a tenant for life is not liable for permissive waste, and, on principle, this decision should govern the case of a tenant for years, though it may be pointed out that anciently tenants for life and [for] years were equally in the position of farmers, while in modern times tenants for life are

ing *tenure* between the lessee and sub-lessee. The sub-lessee holds of the lessee, but the assignee holds of the lessor.

(a). No covenants in a lease bind the sub-lessee, for want of privity either of *contract* or of *estate*.

usually life owners rather than farmers." In *United States v. Bostwick*, 94 U. S. 53, it is said by Waite, C. J., at p. 65: "But in every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to so use the property as not unnecessarily to injure it. . . . Whatever damages would necessarily result from a use for the same purposes by a good tenant must fall upon the lessor. All that the relation of landlord and tenant implies in this particular is, that the tenant while using the property will exercise reasonable care to prevent damage to the inheritance." And again at p. 68: "The implied obligation is not to repair generally, but to so use the property as to make repairs unnecessary, as far as possible. It is, in effect a covenant against voluntary waste, and nothing more."

In 2 Min. Ins. (4th ed.) 615, *United States v. Bostwick* is referred to as a case in which "C. J. Waite propounds some remarkable views touching *permissive waste*; views which the writer conceives to be unwarranted either by authority or sound policy, and contradictory of the terms of the statute of waste." And the learned author thus lays down the law of permissive waste, going to the opposite extreme: "*Permissive waste*, sometimes called *negligent waste*, is generally defined, as we have seen, as a matter of omission only, such as suffering a house to fall, or to be injured, for want of necessary reparations. It will seem, however, to be somewhat more comprehensive than this language would imply. Thus, if destruction be done by a stranger, or a mob; or if fire, originating by the act of an incendiary, or by neglect in a neighboring tenement, consumes the premises, it is supposed to be undeniably waste; and yet, as it cannot with propriety be termed *voluntary waste*, which supposes the action of the tenant, it is believed to fall within the designation of such as is *permissive*. Upon this idea, permissive waste would include not only all destruction arising from neglect of the necessary reparations, but also such as proceeds from the acts of strangers, not public enemies, and from all casualties, not occasioned immediately by the act of God." See the Nitro-Glycerine case, 15 Wall, 524.

As has been said, the law as to the implied obligation of the

(b). Some covenants in a lease bind the assignee, because, though there is no privity of contract between the lessor and assignee, there is privity of estate by reason of the tenure between them.

(c). The covenants in a lease which bind the assignee are such as *run with the land*, i. e., such as are not *collateral* to the land, but relate to it and concern it. Under this head come all *implied* covenants, and such *express* covenants as relate to *things in esse* which are *parcel of the demise*. If they relate to a thing not *in esse*, but which concerns the demised premises, as a wall *to be built* thereon, they do not bind the assignee, unless the lessee covenanted for himself *and his assigns*. Otherwise if it were to repair a wall already on the premises. Wms. R. P. (397); Tayl. L. and T. § 260. But

tenant to keep the premises in repair seems to be undergoing change, and even when the landlord is under no contract obligation to repair, it is believed to be usual for reparations to be voluntarily made by him, and not by the tenant.

In 95 Am. Dec. 121, note, the law is thus laid down as to the tenant's implied duty to repair: "It is not, however, an obligation resting upon the tenant to repair generally, but only to keep the premises in as good repair as he receives them, ordinary wear and tear, and accidental injuries excepted. Thus in the case of buildings, a tenant from year to year is bound to keep them wind and water-tight, in the absence of any special agreement on the subject; but is not bound to make substantial and lasting repairs, such as putting on a new roof; nor is he bound to rebuild when the premises have accidentally become ruinous, or are destroyed, unless by special agreement. But it is the duty of a farm tenant to make all needed current repairs on fences in the absence of a contrary covenant. This implied duty grows out of the occupancy of the land." See 12 Am. & Eng. Ency. Law, 720, note. And see *Windon v. Stuart* (W. Va.) 28 S. E. 776, where it is said, that a tenant must make ordinary repairs to buildings, repair and keep up fences, remove and keep down filth, such as elders, briars, etc., growing on farming and grazing lands, at his own expense, unless otherwise provided in the lease.

now in Virginia all covenants extend to assigns without express mention of them. Code of Virginia, § 2445.¹

§ 64. **Examples of Covenants Running with the Land.**—We have seen that all implied covenants run with the land, and are binding on the assignee, but not on the sub-lessee;

¹ ASSIGNEES AND SUBLESSEES.—For the distinction between an assignment and a sublease, see 15 Am. Dec. 543-545, note. It is there said: "The lessor has against the assignee of the lessee the same right of action that he has against the original lessee for the breach of all covenants in the lease that are annexed to the estate [*i. e.*, which run with the land] as long as he [*i. e.*, the assignee] is in possession. . . . Between the lessor and the under-tenant of the original lessee [*i. e.*, the sub-lessee] there is neither privity of estate nor privity of contract; the lessor, therefore, cannot sue the under-tenant upon the lessee's covenant to pay rent." And see 10 Am. St. Rep., 557-565, note, where there is a full discussion of the assignment of leases, and the respective rights and liabilities of the lessor, assignor and assignee thereafter. It is there laid down that "the lessee of land, notwithstanding his assignment of the lease, continues liable upon express covenant therein. The reason of this rule is, that although by the assignment the privity of estate between the lessor and lessee is terminated, there still remains the privity of contract between them created by the lease, which is not affected by the assignment, although made with the assent of the lessor. . . . Thus the assignment of a lease does not annul the lessee's obligation on his express covenants to pay rent, even though the lessor has accepted the assignee as his tenant, and collected rent from him." And see to the same effect, 1 Am. St. Rep. 83, and note; *Washington Natural Gas Co. v. Johnson*, 123 Pa. St. R., 576 (10 Am. St. Rep. 553). But it should be remembered that the above doctrine of continued liability of lessee after assignment applies only to the lessee's *express* covenants, and not to those implied by law. 1 Washb. R. P. (326); Tayl. L. & T., § 371; 10 Am. St. Rep. 563. We have seen that the assignee of a lease is liable to the lessor on covenants which run with the land. But this liability, being based on privity of estate, continues so long only as the assignee retains the lease; and can be terminated by him at any time by assigning over to another. *Farmers Bank, v. Mutual, etc., Society*, 4 Leigh (69), (84). And though, as we have seen, the sub-

and also that express covenants run with the land when they *relate* to or *concern* it, but not when they are *collateral* or *aside* from the land. Applying this distinction, covenants to cultivate land in a particular manner; to maintain a particular fence, etc., run with the land; but a covenant to pay the debt of a third person does not run with the land; nor would a covenant to keep up a fence on other land belonging to the lessor, but which was not parcel of that demised to the tenant. But a covenant to *renew* the lease runs with the land *in favor of the assignee*.¹

lessee is not bound by the lessee's covenant to pay the rent, and the lessor can maintain no action thereon against the sub-lessee, for want of privity either of contract or estate, it must not be supposed that the goods of the sub-lessee in possession cannot be *distraigned* by the lessor for the lessee's rent. The right to distrain follows the land; for otherwise, by the lessee's sub-lease, the lessor would lose his right of distress altogether. See *Tayl. L. & T.*, § 109; 15 Am. Dec. 554. And the Code of Virginia expressly declares (§ 2791) that the distress may be "levied on any goods of the lessee, or his assignee, or *under-tenant*." *Hutchins v. Commercial Bank*, 91 Va., 68, 77.

¹ COVENANTS RUNNING WITH THE LAND.—Besides the examples given in § 64, the following covenants are held to run with the land: To insure if the insurance is to be laid out in rebuilding; to discharge the lessor from taxes and assessments; not to carry on particular trades; not to erect certain buildings, etc. See *Tayl. L. & T.*, §§ 261, 262; 2 Min. Ins. (4th ed.), 797; 15 Am. Dec. 545; *West Virginia, etc., R. Co. v. McIntire*, 28 S. E. 696. For a full discussion of covenants restricting the use of land, see 21 Am. St. Rep. 484-508; *Hubble v. Cole*, 85 Va., 87. As to covenants to renew leases, see *Upper Appomattox Company v. Hamilton*, 83 Va., 319, 325, where the lease was held not to be a "renewed and extended lease," as was contended by counsel; "for it was not made in pursuance of any covenant or stipulation contained in the original lease, and it not only created a new term after the regular expiration of the first, but it prescribes terms and conditions materially different in several particulars from those contained in the original lease." In *James v. Kibler* (Va.), 26 S. E., 417, it is held that a lease for five years, with a provision that if at the end of the five years the lessee desires to retain

§ 65. **Tenancy from Year to Year.**—This is considered an estate for years; and the best way to create this kind of tenancy is to let the lands to hold “from year to year” simply, without saying more. Wms. R. P. (392). But a tenancy from year to year frequently arises by *implication*, as to which see *infra* under “Estate at Will.” But a lease from year to year is much more advantageous to both landlord and tenant than a lease at will. In the language of Williams: “The advantage consists in this, that both landlord and tenant are entitled to *notice* before the tenancy can be terminated by the other of them. This notice must be given at least half a year before the expiration of the current year of the tenancy; for the tenancy cannot be terminated by one only of the parties, except at the end of any number of whole years from the time it began. So that if the tenant enter on any quarter day, he can quit only on the same quarter day; when once in possession, he has a right to remain for a year; and if no notice to quit be given for half a year after he has had possession, he will have a right to remain two whole years from the time he came in; and so on from year to year.” Wms. R. P. (390).

§ 66. **Notice to Quit.**—For a full discussion of this subject, see *Stedman v. McIntosh*, 4 Iredell’s Law (N. C.), 291; S. C. 42 Am. Dec. 122, and note 125-140. A tenant whose lease is for one year, or for a certain number of years, is not entitled to notice to quit; for he knows beforehand just when his lease will expire. So tenants at will are liable to be dispossessed at any time; and are at common law not entitled to notice to quit, except when the landlord takes this means of terminating the estate, which he may do whenever

the premises for the next five years, he may do so on giving six months’ notice, is not a present lease for ten years; and so does not require to be by deed under the statute of conveyances, Code of Virginia, § 2413. For a case in which specific performance was granted of a covenant to renew a lease for ninety-nine years, see *Selden v. Camp* (Va.), 23 S. E. 377.

he chooses. But a tenancy from year to year requires, as we have seen above, a half year's notice to terminate it at common law; or, as it is usually put, six months' notice before the expiration of the current year of tenancy. But the Virginia statute now enacts (Code, § 2785): "A tenancy from year to year may be terminated by either party giving notice, in writing, prior to the end of any year, *for three months*, if it be of land *within*, and *for six months*, if of land *without* a city or town, of his intention to terminate the same." The statute also provides upon whom the notice may be served, whether given by the landlord or tenant; and that the parties may contract by special agreement that no notice shall be given.¹

¹ ESTOPPEL OF TENANT TO DENY LANDLORD'S TITLE.—It is well settled that a tenant who receives possession of land from another as his landlord is estopped to deny the latter's title in the premises demised. *Nil habuit in tenementis* is not a good plea to the landlord's action for rent. The doctrine has been considered of feudal origin, but this seems to be a mistake. See Wms. R. P. (247), note 2, where the rule is said to be of recent introduction, and to be intended to prevent a tenant from compelling his landlord to prove his title in an action of ejectment, in which the rule is that the plaintiff must recover on the strength of his own title, and not on the weakness of his adversary's, so that but for the estoppel the tenant, though having no title himself, could not be compelled to restore the possession to a landlord whose title was defective. But in Bigelow on Estoppel, 349, while it is admitted that the rule is modern, a different explanation is given of its origin, to which the reader is referred. For a discussion of the general rule and its exceptions, see 1 Greenl. Ev., § 25; 2 Bl. Com. (143) n. 5; 13 Am. Dec. 68-92, note; 69 Id. 510-511. In 13 Am. Dec. 68 it is said: "There is some conflict in the decisions upon the point as to whether when one who is already in possession of land accepts a lease thereof from a claimant of the same from whom he did not receive the possession, he is or is not estopped from denying the title of such claimant, and whether, if he is estopped, such estoppel endures after the expiration of the term. The difficulty upon this head arises from the fact that the estoppel of a tenant to deny his landlord's title is commonly founded upon the position that, having received the possession under such title, he is bound in equity and

II. *Estate at will.*

§ 67. **Creation of Estates at Will.**—This estate may be created by the express or implied agreement of the parties, or it may arise by construction of law. Thus the parties may agree in terms that the lessee shall hold *at the will* of lessor; and then “as he may be turned out when his landlord pleases, so he may leave when he likes.” Wms. R. P. (389); *Cowan v. Radford Iron Co.*, 83 Va. 547. Again, if under an agreement for a lease, the tenant enters, but no certain period of holding is fixed, and the tenant either pays no rent, or pays it without reference to a year’s holding, this is impliedly a tenancy at will. But if under such a lease the tenant enters and pays an annual rent, or rent with reference to a year, he then becomes a tenant from year to year. See *Braythwayte v. Hitchcock*, 10 M. & W. 494; Wms. R. P. (389); Tied. R. P. § 214; 42 Am. Dec. 128. A mortgagor in possession is constructively a tenant at will to the mortgagee; and so is a vendee of land, who enters under a contract of purchase, but who has not received a deed, and such vendee cannot be ousted without previous demand or notice by the vendor. *William-*

good conscience to restore the possession to him from whom he had it before he undertakes to dispute his title.”

In *Jordan v. Katz*, 89 Va. 628, it is held that the general rule that a tenant cannot deny his landlord’s title is not affected by the fact that the tenant is in actual possession at the time he accepts the lease; and that by such acceptance he as effectually recognizes the title and possession of the lessor as if he had entered and taken possession under and by virtue of the lease itself. But in that case there was no proof of fraud, imposition or unfairness; and if it should appear that the tenant was induced to accept the lease through the landlord’s fraud or misrepresentations the tenant would not be estopped. See *Emerick v. Tavener*, 9 Grat. 220; *Creigh v. Henson*, 10 Id. 231; *Alderson v. Miller*, 15 Id. 279; *Dobson v. Culpepper*, 23 Id. 352, 361; *Allen v. Paul*, 24 Id. 332; *Wilcher v. Robertson*, 78 Va. 602; *Locke v. Frasher*, 79 Va. 409; *Rakes v. Rustin Land, etc., Co.* (Va.), 22 S. E. 498; 13 Am. Dec. 68. For the law in West Virginia, see *Campbell v. Fetterman*, 20 W. Va. 398; *Voss v. King*, 33 W. Va. 236.

son v. Paxton, 18 Grat. 475; *Twyman v. Hawley*, 24 Id. 499; *Locke v. Frasher*, 79 Va. 409; *Jones v. Temple*, 87 Va. 210.

For the *rights* which an estate at will confers, and the means by which it may be terminated, see 2 Bl. Com. (146).

III. *Estate by Sufferance.*

§ 68. **Tenants by Sufferance.**—"A tenant by sufferance is one that comes into possession of land by lawful title, but holdeth over by wrong after the determination of his interest. He has only a naked possession, and no estate which he can transfer or transmit, or which is capable of enlargement by release; for he stands in no privity to his landlord, nor is he entitled to notice to quit." 4 Kent's Com. 117; 42 Am. Dec. 130. Thus, if the tenant holds over by the *laches* of the landlord, without fresh leave or permission, he is a tenant by sufferance; but when the tenant by the landlord's *permission* holds over after the expiration of the term, the presumption is that he is tenant from year to year, though this may be rebutted. Thus in *Allen v. Bartlett*, 20 W. Va. 46, it is held that where the tenant holds over after the expiration of his lease, and the lessor receives rent accruing subsequently to the expiration of the term, or does any act from which it may be inferred that he intends to recognize him still as such tenant, he becomes thereby tenant from year to year, upon the conditions of the original lease. See also *Crawford v. Morris*, 5 Grat. 107; *Emerick v. Tavener*, 9 Id. 220; *Creigh v. Henson*, 10 Id. 231; *Harrison v. Middleton*, 11 Id. 527; *Pierce v. Grice*, 92 Va. 763; *Voss v. King*, 38 W. Va. 607.

To regain the possession from a tenant by sufferance, the landlord may enter peaceably, or he may bring ejectment. And in Virginia a very summary remedy is given the landlord—an action for *unlawful detainer*. See Code, § 2716.

§ 69. **Emblements when an Estate is Less than Freehold.**—For the definition of *emblements*, see § 11 *supra*. As to the right of *tenant for life* to emblements, see 2 Bl. Com. (122);

also § 44, *supra*. When the tenant holds for a *certain number of years*, the doctrine is that he is not entitled to emblements; "for the tenant knew the expiration of his term, and, therefore, it is his own folly to sow what he could never reap the profits of." 2 Bl. Com. (145). In England, however, the tenant for a term certain may be entitled, as emblements, to the crops sown before his lease expires (called the way-going crops), by the *particular custom* of the district where the land is situated. See *Wigglesworth v. Dallison*, 1 Doug. 201. But it is settled that no particular custom of this kind can exist in Virginia, and in *Harris v. Carson*, 7 Leigh, 630, it is held: (1) That at common law where land is leased for a fixed and determinate period, the offgoing tenant is not entitled to the waygoing crop; (2) That parol evidence of a *usage* for the offgoing tenant to have the waygoing crop is not admissible to explain a written contract of lease for a fixed and certain period; and (3) That a practice or usage in opposition to the common law, however general it may be, has no force in Virginia on the ground of *custom*, because *not immemorial*. But in other States the offgoing tenant has been allowed the waygoing crop on the ground of usage and custom; immemoriality not being so strictly insisted on as to make such a custom *impossible* in America. See *Stultz v. Dickey*, 5 Binn. (Pa.) 285.¹

¹ USAGE IN VIRGINIA.—In *Reese v. Bates* (Va.), 26 S. E. 865 (3 Va. Law Reg. 136), it is said: "It is, of course, well settled that a usage in opposition to the common law, however general it may be, has no force in this country on the ground of custom (*Harris v. Carson*, 7 Leigh, 632), and there is no customary law in Virginia which *per se* can vest a right in a party claiming under it (*Delaplaine v. Crenshaw*, 15 Grat. 457); but a usage or custom of trade may be shown." See, as to such usage of trade, *Hansbrough v. Neal* (Va.), 27 S. E. 593; *Southwest Land Co. v. Chase* (Va.), 27 S. E. 826; *Reese v. Bates*, *supra*.

In 2 Min. Ins. (4th ed.) 105, it is said with reference to *Harris v. Carson*, that if the lease were not *in writing*, *perhaps* the usage might be provable, if it were shown that the parties probably contracted with reference to it. For cases in which *Harris*

A tenant *at will* is entitled to emblements when the tenancy is determined by the landlord. 2 Bl. Com. (146); *Harris v. Frank*, 49 N. Y. 24. But a tenant by sufferance is said not to be entitled to emblements. *Doe v. Turner*, 7 M. & W. 226; 1 Washb. R. P. (103).

v. Carson was distinguished and the tenant allowed to reap the waygoing crop, see *Mason v. Moyers*, 2 Rob. (Va.) (606); *Kelly v. Todd*, 1 W. Va. 197.

CHAPTER V.

DESCENTS.

§ 70. **Introductory.**—"Property of lands by descent," says Lord Bacon, "is where a man hath lands of inheritance, and dieth, not disposing of them, but leaving them to go (as the law casteth them) to the heir. This is called a descent of law." Bac. Law Tracts, 128. For the distinction between *descent* and *purchase*, see 2 Bl. Com. (201) *n.* 1. The *heir* is the only person who by law becomes the owner of land without his own agency or assent. A title by *deed or devise* requires the assent of the grantee or devisee before it can take effect.¹ But in the case of descent, the law casts the title on the heir without any regard to his wishes or election. He cannot disclaim it if he wishes to do so. 3 Wash. R. P. (402). And an heir at law cannot be disinherited by any wish expressed in a will, however strong, that he should not inherit, unless the estate is actually devised to some other person. All the real estate of inheritance which the testator does not dispose of otherwise goes to the heir by descent—cast upon him

¹ **DISCLAIMER.**—In *Guggenheimer v. Lockridge* (W. Va.), 19 S. E. 874, it is held: "A deed must not only be delivered by the grantor, but must be accepted by the grantee. Acceptance may be express by signing the deed or otherwise, or may be implied from circumstances. The asset of the grantee will be presumed when the deed is beneficial to him until dissent appear. Where dissent or disclaimer appears the deed is inoperative, and the title to the thing granted reverts to the grantor by remitter from such disclaimer." As to mode of disclaimer, it is said in *Suttle v. Richmond, etc., R. Co.*, 76 Va. 284, 286: "It has been long settled in this State that the disclaimer of a freehold can only be by deed or in a court of record. See the case of *Bryan v. Hyre*, 1 Rob. (Va.) 101, a conclusive authority on this subject."

by the law. *Doe v. Lanius*, 3 Ind. 441; *McIntire v. Cross*, *Ib.* 441; *Irwin v. Zane*, 15 W. Va. 646; *Graham v. Graham*, 23 W. Va. 36; *Coffman v. Coffman*, 85 Va. 459.²

The term "ancestor," as used in a statute, means any one from whom an estate is inherited. In this sense an infant brother may be the ancestor of an adult brother, or the child of its father. *Prickett v. Parker*, 3 Ohio St. 394. Upon the death of the ancestor, the real estate he may leave undevise vests at once in the heir, subject to be divested if needed for the payment of the ancestor's debts. *Chubb v. Johnson*, 11 Tex. 469; *Wilson v. Wilson*, 13 Barb. 252. And the law presumes descent to the heir until a devise is affirmatively shown.

² INHERITANCE FROM MURDERED ANCESTOR.—Can an heir apparent who murders his ancestor, in order to inherit his land, take title thereto by descent, notwithstanding his crime? See this question discussed in 1 Va. Law Reg. 383, 847. In *Shellenberger v. Ransom*, 31 Neb. 61 (28 Am. St. Rep. 500), it was held that a father who has wilfully murdered his child for the purpose of acquiring her estate, cannot inherit as her heir; and that a purchaser from the father acquires no title to the child's estate, which passes at her death to her other heirs. But in *Shellenberger v. Ransom*, 41 Neb. 631 (59 N. W. 935), the previous decision is reversed, and it was held that under the statute of descents of Nebraska a man may inherit the property of one whom he kills for that purpose. On the other hand, in *Riggs v. Palmer*, 115 N. Y. 506 (12 Am. St. Rep. 819), it was held (Gray, J., dissenting) that one who murders his ancestor, or a testator, in order to attain property as heir or devisee, will not be allowed to acquire title by crime.

The difficulty in denying title to a murderer heir or devisee arises from the fact that no such exception is made by the statutes of descents or wills; and it is claimed that an exception made by the courts is judicial legislation. On this point it is said by Judge Thompson, in *The American Law Review*, November-December, 1894, p. 919: "The true way to reason upon such a question is to consider whether the legislature ever intended to authorize or sanction such a result. The right is statutory. Is it to be supposed that the legislature, in enacting the statute and creating the right, intended that the right should extend to a man who should bring himself within the letter of

The heir need never prove his ancestor's intestacy; the devisee must prove the will. *Baxter v. Bradbury*, 20 Me. 260; *Lyon v. Kain*, 36 Ill. 368; 3 Wash. R. P. (414). And as a title by descent is deemed worthier than a title by devise, the common law rule was that if an ancestor devised to his *heir* just the estate in quantity and quality which he would have taken by descent, the heir should be deemed to take by descent, and not by devise. *Hoover v. Gregory*, 10 Yerg. 444; *Posey v. Budd*, 21 Md. 480; *Biedler v. Biedler*, 87 Va. 300; Wms. R. P. (218). But now by the statute of 3 and 4 Wm. 4, c. 106, § 3, such heir shall be considered to have acquired the land as a devisee and not by descent.

By the civil law, one may designate or appoint his heir. Bisph. Eq. § 50. But the maxim of the common law is, *solus deus facit heredem non homo*, and heirship depends on consanguinity.¹ The title of the heir is called into existence

the statute by committing the crime of murder? . . . Another and a just way of viewing it is to consider that but for the crime of the heir in murdering his ancestor, he might die in advance of his ancestor, so that some other person would inherit under the statute. He thus by crime seizes that which otherwise might never come to him. He is no heir until murder makes him so, for *nemo est hæres viventis*."

Perhaps the true view to take of the question is, as has been suggested, that, in spite of the crime, the *legal* title passes to the heir or devisee in accordance with the statutes; but that equity will not allow the murderer to profit by his own wrong, and will consider him to hold the legal title for the benefit of others, thus making of him a trustee *ex delicto* on the same principle by which those who obtain the legal title to property by fraud are held to be trustees *ex maleficio*. See Bispham's Equity, § 218.

¹ CHILDREN BY ADOPTION.—See now in Virginia, Acts 1891-'92, p. 262 c. 170 (amended by Acts 1897-'98, p. 38 c. 39), legalizing the adoption of minor children. By § 3 of the Act, it is declared that, when the provisions of the statute are complied with, "such child shall be, to all intents and purposes, the child and heir-at-law of the person so adopting him or her, entitled to all the rights and privileges, and subject to all the obligations of a

by the death of the ancestor, for *nemo est hæres viventis*. As to *heirs presumptive* and *heirs apparent*, see 2 Bl. Com. (208).

§ 71. **The Virginia Statute of Descents.**—For the common law *canons* of descent, which were in force in England until January 1, 1834, see 2 Bl. Com. chap. 14. For the new *rules* of descent introduced by 3 and 4 Wm. 4, c. 106, see Wms. R. P. (100). The law of descent in the United States differs largely from both the common law *canons* and the statutory rules. We shall discuss the subject by an examination of the Virginia statute of descents, explaining as we proceed in what it differs from the law of England. The Virginia Statute was enacted in October, 1785, to take effect January 1, 1787. It was the work of Jefferson, assisted by Pendleton and Wythe, and is regarded as a master-piece of legislation. It has been substantially followed in many of the states.

The first section of the statute is as follows (Code 1887, § 2548): “When any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcenary to such of his kindred, male and female, as are not alien enemies, in the following course:

First. To his children and their descendants.

Second. If there be no child, nor the descendant of any child, then to his father.

Third. If there be no father, then to his mother, brothers and sisters, and their descendants.

Fourth. If there be no mother, nor brother, nor sister, nor

child of such person begotten in lawful wedlock; but on the decease of such person, and the subsequent decease of such adopted child, without issue, the property of such adopting parent still undisposed of, shall descend to his or her next of kin, and not to the next of kin of such adopted child.” For a discussion of the whole subject of adoption, see 39 Am. St. Rep. 210–31, monographic note to *Van Matre v. Sankey*, 148 Ill. 536. For a criticism of the Virginia statute, see 1 Va. Law Reg. p. 463, by Prof. Lile.

any descendant of either, then one moiety shall go to the paternal, the other to the maternal kindred in the following course :

Fifth. First to the grandfather.

Sixth. If none, then to the grandmother, uncles and aunts on the same side, and their descendants.

Seventh. If none such, then to the great-grandfathers, or great-grandfather, if there be but one.

Eighth. If none, then to the great-grandmothers, or great-grandmother, if there be but one, and the brothers and sisters of the grandfathers and grandmothers, and their descendants.

Ninth. And so on in other cases, without end, passing to the nearest lineal male ancestors, and for want of them, to the nearest lineal female ancestors, in the same degree, and the descendants of such male and female ancestors.

Tenth. If there be no father, mother, brother, or sister, nor any descendant of either, nor any paternal kindred, the whole shall go to the maternal kindred; and if there be no maternal kindred, the whole shall go to the paternal kindred. If there be neither maternal nor paternal kindred, the whole shall go to the husband or wife of the intestate; or if the husband or wife be dead, to his or her kindred, in the like course as if such husband or wife had survived the intestate, and died entitled to the estate."

§ 72. Construction of the Statute.—It will be seen that the statute, at the very outset, changes the common law in several essential particulars. (1) It makes the stock of descent the *person having title*, whereas by the common law the stock is the *person last seised*, and by the English statute of 1833, the stock is the *last purchaser*. (2) It abolishes primogeniture, and the preference of males over females; for the estate "shall descend and pass *in parcenary* to his kindred, male and female." (3) The language of the statute, as above given, excludes alien *enemies* only. And by Code of Virginia, § 43, it is declared that, "any

alien, not an enemy, may acquire by purchase or descent and hold real estate in this State; and the same shall be transmitted in the same manner as real estate held by citizens." And see the "Naturalization Act of 1870" in England, 43 Vict., chap. 14, § 2, to the same effect. Wms. R. P. (136).

The rules of descent by the Virginia statute, as set out above, are so plain that they need scarcely any explanation. Attention should be directed, however, to the following points:

(1) The common law maxim, *seisina facit stipitem* (as to which see 2 Bl. Com. 209 *n.* 8), being abolished, all real estate of an intestate to which he has *any title*, whether present or reversionary, whether in possession or in action, will descend to the same heirs, and that without any regard to the *seisin*. *Carney v. Kain* (W. Va.), 23 S. E., 650. (2) The Virginia statute, in default of children or the descendants of children of the intestate, makes *his father* his heir. This is also done by the English statute of 1833. Wms. R. P. (105). But at common law lands would escheat rather than go to any *lineal* ancestor. 2 Bl. Com. (212). (3) It should be observed that the principle on which the statute is framed is stated under "*Ninth*" above. In default of children, *the estate passes to the nearest lineal male ancestor or ancestors, and for want of them to the nearest lineal female ancestor or ancestors, in the same degree, and the descendants of such male and female ancestors*. Thus while lineal *male* ancestors constitute a class by themselves, the lineal *female* ancestors are called to the inheritance together with their children. So the mother of the intestate and her children (his brothers and sisters) form a class; also the grandmother of the intestate and her children (his uncles and aunts) and so on. And the existence of a single member of any class, or any descendant of a member, will cause the entire estate to vest in such member or descendant, to the exclusion of a more remote class, however numerous. (4) The division into moieties between the paternal and

maternal lines takes place when there is no father or mother, no brother or sister, nor the descendants of any of them. But after the division is once made at this point, each moiety goes to the proper kindred *as a class*, on the paternal and maternal side respectively, and there is no further division into moieties as between the *branches* of paternal and maternal kindred. And each moiety keeps on its own side, regardless of the other, so long as there are *any* kindred, however remote, on that side. But if there be no kindred on its side, either moiety may then go to the other. At common law there was nothing analogous to this division into moieties. For if the inheritance was *novum feudum* held *ut antiquum*, the whole went to the paternal kindred, if any; if none, then the whole to the maternal kindred. If it was really *feudum antiquum*, the inheritance went to the collaterals on the side from which it descended, and would escheat rather than go to the other side, because collaterals on that side were not of the blood of the first purchaser. 2 Bl. Com. (222). And by the English statute of 1833, there is no division into moieties, but the paternal kindred are preferred to the maternal. Wms. R. P. (107). (5) The Virginia statute, in default of all other heirs, allows husband or wife to be heir to the other. This is contrary to the common law, which gave the wife dower and the husband curtesy, but preferred that the lands should escheat rather than allow husband or wife, as such, to inherit from the other.

§ 73. *Per Stirpes* and *Per Capita*.—The right of representation, or taking *per stirpes*, prevails universally in the English law of descents, without reference to the nearness or remoteness, and alike as to lineal and collateral inheritance. 2 Bl. Com. (217). The principle was unchanged by the English statute of 1833. The Virginia statute retains the right of representation to a certain extent, though it substitutes *per capita* for *per stirpes*, when justice seems to demand it. The statute is as follows: "When the children of the intestate, or his mother, brothers and sisters, or his

grandmother, uncles and aunts, or any of his female lineal ancestors living, with the children of his deceased lineal ancestors male and female, in the same degree, come into the partition, they shall take *per capita*, or by persons; and where a part of them being dead and a part living, the issue of those dead have a right to partition, such issue shall take *per stirpes*, or by stocks, that is to say, the shares of their deceased parents; *but whenever those entitled to partition are all in the same degree of kindred to the intestate, they shall take per capita, or by persons.*" Code, § 2550.

The statute as drawn by Jefferson did not contain the last word in italics. These were added in the revision of 1849 (taking effect July 1, 1850), as legislative sanction of the decision in *Davis v. Rowe*, 6 Rand. 355, as to which see hereafter. "I understand the rule thus broadly," said Carr, J., in *Davis v. Rowe*, construing the statute in its original form: "Wherever several persons succeed to the inheritance at the same time, if they are all related to the intestate, in equal degree, they shall take by persons; but if part of them be more remote, those shall take the shares of their deceased parents." See also *Browne v. Turberville*, 2 Call 390; *Templeton v. Steptoe*, 1 Munf. 339.

It will be seen that the statute names the several classes, and provides that the members of each class, if *all* are living, shall take *per capita*; and also that if *some* are living and some are dead, the issue of those dead shall take *per stirpes*. But before 1850 (when the words in italics above were added), it did not in *express* terms provide for a case where *all* the members of a class were dead, and partition was to be made between their descendants. Thus, in *Davis v. Rowe*, *supra*, Anthony Gardner died intestate in 1819, leaving no children, nor the descendants of any. He left no father, nor mother, nor brothers, nor sisters, but he had had a brother and a sister who died before him; and at A. G.'s death there were living a niece, Mrs. Davis, the

only child of the brother, and two nephews, James and Francis Rowe, children of the sister. The sister had also had two daughters who married, and died before A. G., leaving issue (his grand-nephews and grand-nieces), the one, two children and the other six children. It was claimed by Mrs. Davis that the statute did not apply to the case, and that she was entitled, as representing her father, to one-half of the estate. But the court held that the case was within the *spirit* of the statute, and that as Mrs. Davis was *in equal degree* with the Rowes, the estate should be divided into five parts, counting Mrs. Davis, the two Rowes, and the sister's two daughters who died leaving issue; and that Mrs. Davis and the two Rowes should each have one-fifth, and that the other two-fifths should go to the issue of the deceased daughters of the sister *per stirpes*, giving to the two children of the one one-tenth each, and to the six children of the other one-thirtieth each.

As the law is now settled by *Davis v. Rowe*, and by the statute of 1850, it is easy to determine whether those called to the inheritance take *per stirpes* or *per capita*. Thus if the intestate leaves children only, or grandchildren only, or great grandchildren only, they take *per capita*, because in equal degree. So if there are nephews only, or great-nephews only. But if there should be children and grandchildren called together to the inheritance, the children would take *per capita*, the grandchildren *per stirpes*. So if there be no children, but grandchildren are called to the inheritance together with great-grandchildren, the former would take *per capita*, the latter, *per stirpes*. The *per capita* line, or line of equal division, runs with the heirs who are nearest in degree to the ancestor. The number of shares in that line is found by counting those who are living, and those who are dead leaving issue. Below the *per capita* line, the division is always *per stirpes*. Thus in *Davis v. Rowe*, the *per capita* line ran with the nephews and nieces, as they were nearest of kin to the intestate. But the great nephews and nieces

took *per stirpes*. And in *Ball v. Ball*, 27 Grat. 325, where the intestate left as her heirs five children of her deceased son S., six children of her deceased son W., and a grandchild of W., the only child of a deceased daughter of W., it was held, that the estate should be divided into twelve equal parts, of which the five children of her son S., the six children of her son W., and the grandchild of W., representing her deceased mother, should each have one part.¹

§ 74. **Descent from an Infant.**—The original statute of descents, as framed by Jefferson, did not contain any special

¹ **PER STIRPES OR PER CAPITA UNDER WILLS.**—In *Walker v. Webster* (Va.), 28 S. E. 570, the residuary clause of a will was as follows: "All the rest and residue of my estate, real, personal, and mixed, I desire shall go to, and be divided in equal parts among, those who would be my heirs-at-law under the statutes of descents and distributions in Virginia, in case I had died intestate." Held, that the heirs-at-law took, under this clause, *per capita* and not *per stirpes*. Judge Riely, in delivering the opinion of the court, said: "The reference to the statute of descents and distributions was simply to designate the persons who were to take the residuum of the estate. The testator did not thereby intend to prescribe also the manner of the division. He does not say that the persons designated were to take as if he had died intestate, which would give some color to the contention that they take in the manner prescribed by the statute, but merely that those persons should take who would be his heirs in case he had died intestate. The reference to the statute ascertains who shall take, but not how they shall take. How they are to take is otherwise prescribed. They are to take 'in equal parts.' If the testator had meant that both the persons who were to take and the manner of the division should be in accordance with the statute, as if he had died intestate, then this clause in his will was entirely useless; for in that case the same persons would take, and in the same manner, as if he had died intestate. It is to be presumed that he had some object in inserting this clause in his will. That object is, to my mind, unmistakable. He meant that these persons who would be his heirs-at-law, under the statute, in case of intestacy, should have the residuum of his estate; yet he did not intend that they should take it in the manner prescribed by the statute, but equally. . . . If they were held

provisions as to the estates of infants. Statutes, however, upon this subject, were passed in 1792 and in 1819, which gave rise to many doubts. In the revision of 1849, the law was enacted as it now appears in the Code of 1887, chap. 113, § 2556: "If an infant die without issue, having title to real estate derived by gift, devise or descent, from one

to take *per stirpes* instead of *per capita*, then they would take in unequal instead of equal parts. Helen Kemple and Mary E. Webster, sisters of the testator, would each receive, under that construction, one-third of the residuum, while Elenia P. Walker, a daughter of Eliza Brannon, a deceased sister of the testator, would receive one-sixth, and Lena Leadbetter, Mariana Newman and Bessie Newman, children of Eliza Newman, deceased, another daughter of Eliza Brannon, would divide the remaining one-sixth between them, making the share of each of them one-eighteenth, in direct violation of the principle of equality of division expressly prescribed by the testator in the clause of the will making the gift." In *Hoxton v. Griffith*, 18 Grat. 574, 577, the general principle is thus laid down: "When a bequest is made to several persons, in general terms indicating that they are to take equally as tenants in common; each individual will, of course, take the same share; in other words, the legatees will take *per capita*. The same rule applies when a bequest is to one who is living, and to the children of another who is dead, whatever may be the relations of the parties to each other, or however the statute of distributions might operate upon those relations in case of intestacy. Thus when property is given 'to my brother A and to the children of my Brother B, A takes a share only equal to that of each of the children of B. So that when the gift is 'to A's and B's children,' or 'to the children of A and the children of B,' the children take, as individuals, *per capita*. The substance of this rule of construction is that, in the absence of explanation, the children, in such a case, are presumed to be referred to as individuals and not as a class." It is added that "this rule is not inflexible, and will yield to the cardinal rule of construction, which requires that effect shall be given to the intention of the testator, to be collected from the whole will"; and in the case at bar the general rule was held to yield to the manifest intention of the testatrix. For cases in which the general rule was applied, see *Crow v. Crow*, 1 Leigh (Va.), 74; *McMaster v. McMaster*, 10 Grat. (Va.), 275; *Senger v. Senger*, 81 Va., 687.

of his parents, the whole of it shall descend and pass to his kindred on the side of that parent from whom it was so derived, if any such kindred be living at the death of the infant. If there be none such, then it shall descend and pass to his kindred on the side of the other parent."

It is manifest that the old feudal idea of the *blood of the first purchaser* is here recognized. But the principle of the law is a natural one. It is to prevent the transfer of estates from one family to another under the following circumstances: B marries F, who has title to real estate. A child is born to F who survives his mother only a few hours, she dying in child-birth. It would be unjust that B should inherit F's estate from the child, and transmit it to *his* heirs, perhaps his children by a second wife. It is enough, in such a case, that B should have curtesy. See *Vaughan v. Jones*, 23 Grat. 444.

It should be borne in mind that the real estate of an infant will descend in the same manner as that of an adult: (1) Unless it is derived by gift, devise or descent from one of his *parents*; *i. e.*, unless it is derived from his *father* or *mother*, not grandfather or grandmother, or any other relation than *parents*. (2) Unless the estate is derived *directly* from one of his parents; *e. g.*, if the estate descends from a parent to a *brother* of the infant, and from the brother to the infant, this estate is not derived from the parent in the meaning of the statute.

A good example of the descent of an infant's estate is found in *Davis v. Christian*, 15 Grat. 11, 32. There J. B. C. devised two-ninths of his realty to each of his three daughters, Hannah, Jane, and Sarah. All three died before their mother, Abby C.; Hannah, in 1839, an infant; Jane, in 1840, an adult; and Sarah, in 1841, an infant. On the death of Hannah, her two-ninths, derived directly by devise from her father, went to her sisters equally, to the exclusion of her mother. When Jane died next, an adult, her estate passed to her mother and her sister Sarah in equal shares.

In the death of Sarah, an infant, her estate descended as follows: the two-ninths received directly from her father could not go to Abby C., her mother, but went to an aunt on the side of the father. But the shares inherited from her sister, viz., one-ninth from Hannah, and three-eighteenths from Jane, went to her mother, as these were not derived directly from the father. So that Abby C. inherited from her daughters four-ninths in all. The above example shows the importance in tracing descent of paying strict attention: (1) to the *order* in which deaths occur; (2) to the *age* of each decedent, whether infant or adult; and (3) the *source* from which interests in land are derived, when an infant dies without issue, having title to real estate.

In *Vaughan v. Jones*, 23 Grat. 444, the real estate of F, a female infant, was sold by decree of court under Code, Va., § 2616, and the proceeds reinvested under § 2622. F married B, and died under twenty-one, leaving a child who survived her but a few hours, and her husband who survived the child. *Held*, (1) that though the real estate of F. had been sold, yet by Code of Virginia, § 2626, the proceeds descended as realty, and went in the first place to the child of F, subject to a life estate in B; (2) that on the death of the child, the proceeds, as realty derived from the mother, passed to the heirs of the child on the part of the mother, and not to the father.

§ 75. **Collaterals of the Half-Blood.**—For full discussion, see 61 Am. Dec. 655-67; also 12 Am. St. Rep. 110, 111. At common law, collaterals of the half-blood were totally excluded from the inheritance. 2 Bl. Com. (224). But it should be remembered that if the descent is *lineal*, the doctrine of the half-blood has no application; for the heirs, though of half-blood to each other, are of the whole blood to the ancestor. Thus, if the descent be from a *father*, all of his children, though by different wives, are of the whole blood to the father, and, if daughters, would be entitled in England as co-parceners. But at common law if a man should die

seised of land, and have no kindred except brothers of the half-blood, the land would escheat to the lord.

The explanation of the maxim, *possessio fratris facit sororem esse heredem* (as to which see 2 Bl. Com. (228) n. 26), depends on the foregoing principles. Suppose P marries two wives, M and N, and has by M a son, A, and a daughter, B, and by N, the second wife, a son, C. Now, on the death of P, if A enters and is seised, A will be the stock of descent, and on A's death, the land will descend to B, his sister of the whole blood, and C, the brother of the half-blood, will be excluded. Here the possession (or seisin) of A (the brother) makes his sister (B) his heir, because when A is the stock the descent is collateral, and only the whole blood can inherit. But suppose A had died without entry. Then the descent would be lineal, *i. e.*, from P, the person last seised, and C would take over B by preference of males, both B and C being equally of the whole blood to P, their father.

The Virginia law as to the half-blood is as follows: "Collaterals of the half-blood shall inherit only half so much as those of the whole blood; but if all the collaterals be of the half-blood, the ascending kindred, if any, shall have double portions." Code § 2549. It will be seen that in Virginia collaterals of the half-blood are called to the inheritance *in the same class* with the whole blood, taking half portions. But in England, by the statute of 1833, the half-blood are *postponed* to the whole blood, *i. e.*, if there is a brother of the whole blood, half-brothers would not inherit at all. Wms. R. P. (109).

Under the Virginia statute, an easy rule by which to determine the proportions is to double the number of the collaterals of the whole blood, and then add those of the half-blood. This will give the parts into which the estate is to be divided, and the whole blood take each two parts, the half-blood each one part. Thus if the descent is from A, and his heirs are two brothers of the whole blood, and a

sister of the half blood, the inheritance will be divided into *five* parts, of which the brothers will each receive two parts, and the sister one part. And in this case, if we suppose the mother of A living, the inheritance would be divided into *seven* parts, of which she would receive two parts, and the other five parts would be divided as before. If, however, the mother of the half-blood, the *stepmother* of A, be living, she would inherit nothing from A, because not of his blood. And if the mother of A be living, and also children of hers by a second husband, but A is the only child by the first husband, then on the death of A, there being no collaterals of the whole blood, the mother would take twice as much as any one of her children, for this is the case in which the statute declares that "the ascending kindred shall have double portions. *Moore v. Connor* (Va.), 20, S. E. 936.

§ 76. **Bastards.**—At common law a bastard cannot inherit even from his mother. 2 Bl. Com. (247). He cannot *transmit* inheritance even *ex parte materna*. And as a bastard can have no heirs but those of his own body, neither his mother, nor brothers, etc., can inherit from him. Wms. R. P. (126).

By statute in Virginia, "Bastards shall be capable of inheriting and transmitting inheritance on the part of their mother as if lawfully begotten." Code § 2552. And this is the rule generally in the United States. Wms. R. P. (126), n. 2. But as to the father and the paternal kindred, a bastard's disability to inherit and transmit inheritance remains the same as at common law.

In *Garland v. Harrison*, 8 Leigh 368, a question arose as to what is meant by "transmitting inheritance on the part of the mother." Does it mean only that from her *through* her bastard child, an estate may pass to his descendants? Or does it mean that *all* the rules of descent apply to bastards, in respect to kindred, the mother included, *ex parte materna*? The latter was considered to be the

construction, though the Supreme Court of the United States had decided otherwise in *Stevenson v. Sullivant*, 5 Wheat. 207. It was held, therefore, in *Garland v. Harrison*, where a bastard died intestate, without issue, leaving a mother and two bastard uterine brothers, that the mother and half-brother should inherit together from him, the mother taking a whole share, and the half-brothers half shares. A bastard cannot have whole brothers, but every uterine brother, whether legitimate or spurious, is his half-brother. See also *Hepburn v. Dundas*, 13 Grat. 219; *Bennett v. Toler*, 15 Id. 588.¹

§ 77. **Heirs not in esse at the Ancestor's Death.**—The common law rule upon this subject was extremely liberal. It was not even necessary that the heir should be *en ventre sa mere* at the ancestor's death; he was still allowed to take, though born many years after. And in this way it might happen that an estate would vest successively in several heirs presumptive before finally descending to him whose title was indefeasible. Thus, let P and M be husband and wife, and suppose the parents of P are living. P has a son, A, who dies seised of land. This land might descend first to the *aunt* of A, the sister of P. But as the parents

¹ 1. WHO ARE BASTARDS IN VIRGINIA.—By Code of Virginia, § 2553: "If a man having had a child or children by a woman, shall afterwards intermarry with her, such child, or children, or their descendants, if recognized by him before or after the marriage, shall be deemed legitimate." And by § 2554: "The issue of marriages deemed null in law, or dissolved by a court, shall, nevertheless, be deemed legitimate." On the construction of § 2554, see *Stones v. Keeling*, 5 Call (Va.) 148; *Greenhow v. James*, 80 Va. 636; *Heckert v. Hile*, 90 Va. 390. For the construction of Code of Virginia, § 2227, legitimating the children of colored persons, when prior to the 27th day of February, 1866, they "agreed to occupy the relation to each other of husband and wife, and were cohabiting together as such at that date, whether the rites of marriage had been celebrated between them or not," see *Fitchett v. Smith*, 78 Va. 524; *Smith v. Perry*, 80 Va. 563. And see on the whole subject of descents, 12 Am. St. Rep., monographic note, pp. 80-111.

of P are living, a son might be born to them, and he would take the land as *uncle* of A in preference to the aunt. If, now, a daughter is born to P and M, this *sister* of A will take the land from the uncle, as nearer in degree to her brother. And, finally, a son born to P and M will take the land from the sister by preference of males over females. See 2 Bl. Com. (208), n. 6.

For a long time, the law of Virginia as to heirs not in being at the ancestor's death was very strict. By the act of 1875, it was declared, that, "No right in the inheritance shall accrue to any persons whatever, other than *children* of the intestate, unless they be in being, and capable in law to take as heirs at the time of the ancestor's death." 1 Rev. Code, p. 357. By this statute even infants *en ventre sa mere*, unless *children* could not take. And the word *children* did not extend to grand-children. *Blunt v. Gee*, 5 Call, 512. But by a statute passed February 21, 1840, it is provided that, "Any person *en ventre sa mere*, who may be born in ten months after the death of the intestate, shall be capable of taking by inheritance, in the same manner as if he were in being at the time of such death." Code of Virginia § 2555. By this statute not only *children*, but *any person en ventre sa mere* at the death of the intestate can inherit.

A case, however, might occur in Virginia, even under the present law, in which those who would have been heirs if *en ventre sa mere* at the death of the intestate, would be excluded from the inheritance. Thus, suppose A should die intestate, leaving his mother and brothers his heirs. Now; if his mother should marry again after the death of A, and have a child, such child would be of the half blood to A, but he could not claim any part of A's estate, because not *en ventre sa mere* at his death.

§ 78. **Descent in the United States.**—The statutes of descents of the several States have many minor differences, but they all depart widely from the canons of the common

law. In all of them, the descent is in the first place to the children, though in some the husband and wife inherit with the children. If no children, the rules are various. In some of the States the Virginia rule is followed, and the father takes first, and, if none, mother, brothers and sisters take together. But in Alabama the descent is, if no children, first to brothers and sisters, then to father, then to mother; in Arkansas, first to the father, then to the mother, then to the brothers and sisters; in Texas, to father and mother, and then to brothers and sisters; in Missouri, to father, mother, brothers, and sisters, in equal shares. 3 Wash. R. P. (412).

In some of the States, inquiry is made from whom the estate was derived; and if from either parent, it goes first to the kindred on that side, as in Virginia when the descent is from an infant. The rules as to *per stirpes* and *per capita* are various. As to the half blood, in some of the States no distinction is made between them and the whole blood; in some the half blood take half portions, as in Virginia; in some they are postponed to the whole blood, as is now the case in England; but in none are they totally excluded as at common law.

§ 79. Statute of Distribution.—For the English statute, see 2 Bl. Com. (575). The Virginia statute is as follows: “When any person shall die intestate as to his personal estate, or any part thereof, the surplus, subject to the provisions of chapter 178, after the payment of funeral expenses, charges of administration and debts, shall pass and be distributed to and among the same persons, and in the same proportions, to whom and in which real estate is directed to descend, except as follows: (1) The personal estate of an infant shall be distributed as if he were an adult. (2) If the intestate was a married woman, her husband shall be entitled to the whole of the said surplus of the personal estate. (3) If the intestate leaves a widow, and issue by her, the widow shall be entitled to one-third of the said surplus. (4) If the in-

testate leave a widow, but no issue by her, the widow shall be entitled absolutely to such of the personal property in the said surplus as shall have been acquired by the intestate, in virtue of his marriage with her, prior to April 4, 1877 [date of first Married Woman's Act in Virginia. See Acts 1876-'77, c. 349], and remain in kind at his death; she shall also be entitled, if the intestate leave issue by a former marriage, to one-third; if no such issue, to one-half the residue of such surplus." Code of Virginia, § 2557.

"The foregoing provisions in favor of the wife are all subject to this qualification, that if she, of her own free will, leave her husband and live in adultery, she shall have no part of the personal estate as to which he dies intestate, unless her husband, after she so left him, was reconciled to her, and suffered her to live with him." Code of Virginia, § 2560. And by § 2296: "If a husband wilfully deserts or abandons his wife, and such desertion or abandonment continues until her death, he shall be barred of all interest in her separate or other estate, as tenant by the curtesy, distributec, or otherwise."

CHAPTER VI.

DEVICES.

§ 80. The English and Virginia Statutes.

(1). *In England.* By statute of 1 Victoria, ch. 26, § 9 (taking effect January 1, 1838), "No will shall be valid unless it shall be in writing, and executed in the manner hereafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest, and shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary." See 3 Jarman on Wills, Appendix, 721-805, for the whole Wills Act of 1837. This statute is substantially followed in many of our states. By it the same formalities of execution are required of wills of both realty and personalty, and all wills (olograph or not olograph) are required to be attested by at least *two* witnesses. The English Statute of Frauds required *three* witnesses; but this applied to wills of *land* only. It has been followed as to the number of witnesses in some of the American states (Georgia and Maryland, for example), which require *three* witnesses to a will.

(2). *In Virginia.* By Code of Va., § 2514: "No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it *manifest* that the name was intended as a signature; and moreover, unless it be *wholly written* [olograph] by the testator, the signature shall be made or the will acknowledged by him in the presence of *at least two competent witnesses*, present

at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.”¹ This statute took effect July 1, 1850 (Code of 1849, ch. 122, § 4), and is based on the Wills Act of 1 Victoria. *Rudisill v. Rodes*, 29 Grat. 147. But observe these differences between England and Virginia:

(a). *As to signature.* The English statute requires a will to be signed “at the foot or end thereof,” but the Virginia statute says, “signed in such manner as to make it manifest that the name was intended as a signature.” As to the effect of these words, see hereafter.

(b). *As to witnesses.* The English statute requires *all* wills to be attested by two witnesses; the Virginia statute requires no witnesses when the will is “wholly written by the testator,” *i. e.*, in the case of an *olograph* will.

§ 81. **Who May Make a Will.**—All persons who are of sound mind and over twenty-one. And in Virginia minors eighteen years old may dispose of *personal* property by

¹ VERBAL TESTAMENTARY TRUSTS.—In *Sims v. Sims* (Va.), 27 S. E., 436, it is said by Riely, J.: “Each and every part of the last will and testament of a decedent must be in writing, and be executed in the mode prescribed by the statute; and if any part is in parol, such part is void and inoperative in the absence of fraud. In *Sprinkle v. Hayworth*, 26 Grat., 392, it was said by Judge Moncure, in delivering the opinion of the court, that the statute of wills ‘plainly forbids that a parol will, whether in the form of a trust or otherwise, shall be set up and established.’ An exception to the rule is allowed and enforced in equity, where the devisee or legatee has procured an absolute devise or bequest to himself by promising the testator that he would hold it for the benefit of another, and afterwards refuses to perform his promise, but claims to hold the property in his own right and for his own benefit. The exception to the rule is allowed upon the ground of the trust resulting from the confidence reposed in him by the testator, and because not to do so would permit the devisee or legatee to profit by his own fraud, and in such a case to convert the statute of wills into a law for the consummation of fraud instead of being a law for its prevention.”

will. A married woman can make a will of her separate estate, or in the exercise of a power of appointment. See Code of Va., § 2286 and § 2513.¹

§ 82. **What May be Willed.**—All of a person's property, real or personal, which would, if not willed, descend to his heirs, or pass to his personal representative. But in Vir-

¹ **CONTRACT TO MAKE A WILL.**—In *Rice v. Hartman*, 84 Va. 251, it is held that when one in his lifetime, for a valuable consideration, promises to make a provision by his will for another, and dies without doing so, the promisee is entitled, in a suit against the promisor's estate, to receive such sum as the promisor, in pursuance of his contract, ought to have bequeathed the promisee. And in *Thomas v. Armstrong*, 86 Va. 323, it is decided that a promise to leave the promisee a support at the death of the promisor, in consideration of services during the remainder of the promisor's life, to be performed by the promisee, is enforceable against the estate of the promisor; and this, though the contract is not in writing, as Code of Va., § 2840, cl. 7, prohibiting an action "upon any agreement that is not to be performed within a year," does not apply "if by its terms, or by reasonable construction, a contract not in writing can be fully performed within a year, although it can only be done by the occurrence of some improbable event, as the death of the person referred to." See *Seddon v. Rosenbaum*, 85 Va. 928.

In *Hale v. Hale*, 90 Va. 728, it is said: "There is no doubt, notwithstanding a will is in its nature ambulatory until the testator's death, and cannot be made irrevocable, that a person may, by a definite and certain contract, bind himself to dispose of his estate by will in a particular way, and that such a contract, in a proper case, will be specifically enforced in equity; that is to say, the property will be held charged with a trust in the hands of the heir at law, devisee, personal representative, or purchaser with notice of the agreement, as the case may be, and a conveyance or accounting directed in accordance with the terms of the agreement." But in this case the contract was in respect to land, and it held unenforceable under Code of Va., § 2840, cl. 6, requiring contracts for the sale of real estate to be in writing. And it was further held that the circumstances did not amount to *part performance* so as to make a case for specific performance of the unwritten contract in a court of equity. See *Maddison v. Alderson*, 8 App. Cas. (H. of L.) 467.

ginia a man cannot will away his wife's dower (Code Va., §§ 2270-71), nor her "thirds" in his chattels. (Code Va., § 2559.) Nor can a woman deprive her husband of his curtesy in her land "by her sole act," whether by a deed or by will. (Code Va., § 2286.) But in the absence of a statute, a father can disinherit his children, cut them off *without* a shilling. But the property must be actually *devised* to others, or the children (heirs) will inherit, as we have already seen.¹ 2 Bl. Com. (503).

§ 83. The Several Sorts of Wills.

(a). *Nuncupative* (i. e., verbal). Only as to *personalty*. Not now allowed in England nor in Virginia, except in case of "a soldier being in actual military service, or a mariner or seaman being at sea." Code Va., § 2516; 1 Vict. chap. 26, § 13.

¹ PRETERMITTED CHILDREN.—By Code of Va., § 2527: "If any person die leaving a child, or his wife with child which shall be born alive, and leaving a will made when such person had no child living, wherein any child he might have is not provided for or mentioned, such will, except so far as it provides for the payment of the debts of the testator, shall be construed as if the devises and bequests therein had been limited to take effect in the event that the child shall die under the age of twenty-one years, unmarried and without issue." And by § 2528: "If a will be made when a testator has a child living, and a child be born afterwards, such after-born child or any descendant of his, if not provided for by any settlement, and neither provided for nor expressly excluded by the will, but only pretermitted, shall succeed to such portion of the testator's estate as he would have been entitled to if the testator had died intestate; towards raising which portion, the devisees and legatees shall, out of what is devised and bequeathed to them, contribute ratably, either in kind or in money as a court of equity in the particular case shall deem most proper. But if any such after-born child, or descendant, die under the age of twenty-one years, unmarried and without issue, his portion of the estate, or so much thereof as may remain unexpended in his support and education, shall revert to the person to whom it was given by will." See *Conlam v. Doull*, 133 U. S. 216.

(b). *Olograph*. These in England and in most of our States are required to be *witnessed*, no distinction being made between a will wholly written by the testator himself and one written for him, in whole or in part, by the hand of another. But in six or seven of the States (including Virginia and West Virginia) an olograph will need not be attested, but is probated on proof of the testator's handwriting. For discussion of olograph wills, see 52 Am. Dec. 591-593, note; see also 99 Am. Dec. 729; 17 Am. St. Rep. 798; 28 Id. 498.

(c). *Not olograph*, i. e., not wholly in the testator's handwriting. These everywhere require to be attested by subscribing witnesses—by *two* witnesses in England, Virginia, and many of the States; and by *three* witnesses in some of the States. A will of land is governed by the law of the *situs* (*lex loci rei sitae*); a will of personalty by the law of the domicile of the testator (*lex domicilii*). *Robertson v. Pickrell*, 109 U. S., 608; *De Vaughn v. Hutchinson*, 165 U. S., 566; *Bolling v. Bolling*, 88 Va., 524; *White v. Tenant*, 31 W. Va., 790. For what constitutes domicile, and how it may be changed, see *Lamar v. Micou*, 114 U. S., 218; *Chicago, etc., R. Co., v. Ohle*, 117 U. S., 123; *Anderson v. Watt*, 138 U. S., 694; *Lindsay v. Murphy*, 76 Va., 428.

§ 84. Formalities for Making a Will.

(1). *What is a sufficient signing by the testator?*

(a). *In England*. "At the foot or end thereof." For meaning of these words, see statute of 15 and 16 Vict. ch. 24. explaining 1 Vict., ch. 26; Wms. Real Property, 205.

(b). *In Virginia*. "In such manner as to make it manifest that the name was intended as a signature." Code of Va., § 2514. See these words explained in *Ramsey v. Ramsey*, 13 Grat., 664; *Roy v. Roy*, 16 Grat., 418; and especially in *Warwick v. Warwick*, 86 Va., 596. The doctrine established in Virginia is that unless it appears *affirmatively* on the face of the paper that the name of the testator was intended as a signature, it is not a sufficient signing under

the statute; and that the testator's name at the top or beginning of the will is an *equivocal* act, and will therefore be insufficient, unless there be on the face of the will evidence to make it *manifest* that the name was regarded as a signature, and that the instrument was to be complete without further signing. So that in Virginia not to sign a will at the *foot* or *end* is hazardous in the extreme. In *Warwick v. Warwick, supra*, the will began thus: "I, Abraham Warwick, Jr., declare this to be my last will and testament." Then followed the provisions of the will without a signature at the end. The testator placed the paper in an envelope and sealed it, and wrote on the envelope: "My will, Abraham Warwick, Jr." Held, that the will was not so signed as to satisfy the Virginia statute. For the signature at the top of the will was an *equivocal* act *per se*, and there was nothing on the face of the will to remove the equivocation; and as to the name on the envelope, it was not a signature at all to the will, but a mere *label* or *endorsement* of the envelope which contained what the testator *supposed* was *already* a validly executed will.

(2). *Does an unsigned attestation clause invalidate an olograph will signed by the testator?* This question is answered in the negative in *Perkins v. Jones*, 84 Va. 358, on the ground that an olograph will is perfect without any attestation, and so the incomplete attestation clause is simply a nullity, not affecting the validity of the already complete will.

(3). *When a will is not olograph, and must have two witnesses, in whose presence must the testator sign his name?* He must sign in the presence of the two witnesses, present at the same time. He cannot sign or acknowledge the will at different times, in the presence of one witness only at each time, but he must sign, or acknowledge, in their *joint presence*. This is *absolutely essential* to the validity of the will.

(4). *In whose presence must the witnesses sign?* They must sign in the presence of *the testator*, but need not sign

in the *presence of each other*. This is the law in England and in Virginia, and is said to be the general rule. Tied. R. P., § 877. That subscribing witnesses need not sign *in each other's presence*, see in Virginia, *Parramore v. Taylor*, 11 Grat. 220; *Beane v. Yerby*, 12 Id. 239; *Green v. Crain*, 12 Id. 252. But the West Virginia Code declares that the subscribing witnesses "shall subscribe the will in the presence of the testator *and of each other*." Code of W. Va., chap. 77, § 3; and this is no doubt law in other States.

(5). *What is meant by "in the presence of the testator"?* In Tiedeman R. P., § 877, it is said: "What is a sufficient 'presence' is governed largely by circumstances. In determining this question, there are only two elements to be considered—*first*, were the witnesses at the time of the signing so situated that the testator could see them; and, *secondly*, was he in a conscious state? It is not necessary that the testator should actually see the signing, if he was in a position to see it if he wanted to. Not only is this true, but if the testator is blind, the will will be properly attested if the witnesses when signing were in such a position that the testator could have seen them if he had had his sight. And it is not even necessary that the testator should be in the same room with the witnesses. Attestation in a different room, although presumptively bad, will be good if the testator could see the performance of the act of attestation." The Virginia cases are in accord with the above statement of the law. As to subscription within the testator's *potential* vision, see *Neil v. Neil*, 1 Leigh (6); *Moore v. Moore*, 8 Grat. 307; *Nock v. Nock*, 10 Id. 106; *Young v. Barner*, 27 Id. 96; *Baldwin v. Baldwin*, 81 Va. 405. That it must be in the testator's *conscious* presence, *i. e.*, in the presence of a conscious testator, see *Cheatham v. Hatcher*, 30 Grat. 56; *Baldwin v. Baldwin*, 81 Va. 405; *Tucker v. Sandidge*, 85 Va. 546; *Chappel v. Trent*, 90 Va. 849, 935.

(6). *Can the testator acknowledge in the presence of witnesses his signature made previously, and not in their pres-*

ence? Yes, under Wills Act of 1 Victoria. In Virginia the language is, "the signature shall be made, or the *will* acknowledged," in the presence of the witnesses.

(7). *Can a subscribing witness acknowledge, in the testator's presence, his signature previously made out of the testator's presence?* No, in England, by 1 Victoria. See *Hindmarsh v. Charlton*, 8 H. of L. Cas. 159. Yes, in Virginia, by statute before July 1, 1850. *Sturdivant v. Birchett*, 10 Grat. 67, two judges dissenting. *Quare*, now in Virginia, under statute taking effect July 1, 1850, whose phraseology is different from the former statute. The decision in *Birchett v. Sturdivant* has been regretted. See 2 Min. Ins. (920).

(8). *What must the subscribing witnesses attest by their signatures?*

(a). In England. That the testator has *already* signed the will in the presence of the two witnesses, both present together. Until the testator has so signed, there is *nothing to be attested*. See *Hindmarsh v. Charlton*, 8 H. of L. Cas. 159, 161, 168. Here the testator, in the forenoon, signed, in the presence of one of the witnesses, a certain Fred. Wm. Nap. Wilson, who signed his name in the presence of the testator, but did not cross the "F" in "Fred." In the afternoon, the other witness, Dr. White, was present, and the testator acknowledged his signature in the presence of Wilson and White, both present together. White then signed in the presence of the testator, and Wilson added the cross to the "F" in "Fred," and wrote the day and month. Held, an invalid execution. For when Wilson signed his name in the forenoon, when the testator has signed *in his presence only*, there was nothing to attest; and though the testator in the afternoon acknowledged his signature in the joint presence of both witnesses, Wilson did not, *after that*, *subscribe* his name, an *acknowledgment* by him not being sufficient, and the crossing of the "F" not amounting to a *new* signature.

(b). In Virginia. It is held contrary to *Hindmarsh v.*

Charlton, that a witness may *subscribe* the will before it has been signed or acknowledged by the testator in the presence of two witnesses, both present together, if it is subsequently *acknowledged* by the testator in the joint presence of the two witnesses. See *Parramore v. Taylor*, 11 Grat. 226; *Beane v. Yerby*, 12 Id. 237; *Green v. Crain*, 12 Id. 252. This Virginia doctrine is not to be commended. See in favor of the English doctrine, 87 Am. Dec. 687; 1 Redfield on Wills, 226, and note 6.

(9). *What amounts to a signature as a subscribing witness?*

The signature must be by way of attestation, not as an agent only. See *Peake v. Jenkins*, 80 Va. 293, where the execution of the will was as follows:

“ANNA L. JENKINS,
“By *Mary F. Holladay*.”

“April 13, 1870.

“Witness:

“LUCY P. B. LIPSCOMB.”

Held, Mary F. Holladay, who had written the will for Anna L. Jenkins, and signed Anna L. Jenkins' name, had written her own name, not as a witness, but to indicate *agency*, and so the will failed for lack of two witnesses.

(10). *Form of Attestation*. No form is *required*, but it is better to have the subscribing witnesses sign a form of attestation, reciting compliance with all the formalities required. The following form is believed to be sufficient everywhere:

“Signed, sealed, published, and declared by William Brown (the testator), as and for his last will and testament, in the presence of us, all three present at the same time, who, at his request, in his presence, and in the presence of one another, have hereunto subscribed our names as attesting wit-

nesses.” Then follow the signatures of three attesting witnesses.¹

The above contains more than is required in Virginia. We require *two* witnesses only, and the witnesses need not subscribe in the presence of *each other*, but only in the presence of the testator. And a will, unlike a deed, does not require to be *sealed*. But the above formalities can *do no harm*, and it is better to observe them; and it is safer to have three witnesses.

§ 85. **Who are Competent Witnesses to a Will?**—The Virginia statute says that the testator must sign “in the presence of at least two *competent* witnesses.” At common law *interest* in the result of a suit disqualified a witness to testify; but the general disqualification is removed in Virginia by Code of Va., § 3345, enacting that “no person shall be incompetent to testify by reason of interest.” But § 3346 qualifies § 3345 by declaring that “the competency of attesting witnesses to wills and deeds shall be determined by the law in force the day before this code takes effect”; *i. e.*, by the common law as modified by previous statutes. And by § 3346 husband and wife were disqualified still, as at common law, to testify for or against each other. Hence, legatees and devisees, and the husband or wife of a legatee or devisee, remained in Virginia incompetent witnesses to wills.² But it is provided by Code of Va., § 2529, that

¹ In 4 Min. Ins. (3rd ed.), pp. 1613–1618, the form of attestation given is as follows: “Signed and published by T. T., as and for his last will, in the presence of us, who in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.” This is defective, because of its omission to state that the testator signed in the presence of the witnesses *present at the same time*. The statement that the subscribing witnesses signed *in the presence of each other* is not necessary in Virginia, as is stated above.

² **HUSBAND AND WIFE AS WITNESSES TO WILLS.**—Are husband and wife now in Virginia competent witnesses to wills, under Acts 1893–’94, p. 722, c. 619, declaring that, “husband and wife shall be

“if a will be attested by a person to whom, or to whose wife or husband, any beneficial interest in any estate is thereby devised or bequeathed, if the will may not be otherwise proved, such person shall be deemed a competent witness, but such devise or bequest shall be void, except that if such witness

competent to testify for and against each other in all civil cases,” with certain exceptions not relating to wills? Suppose, (1) that a wife attests the will of her husband under which she is not a beneficiary; (2) that she attests his will and is also a legatee or devisee; and (3) that she attests the will of a third person under which he is a beneficiary. Is she a competent witness? In *Pease v. Allis*, 110 Mass., 157 (14 Am. Rep., 591), it appeared that one of the three witnesses to the will of William S. Allis was his wife. It was held that she was incompetent and the will invalid. The following is the opinion by Chapman, C. J.: “By the Gen. Stats. [of Massachusetts], ch. 92, § 6, a will must be subscribed by three or more competent witnesses. They must be competent at the time of the attestation of the will. By the common law it is a settled principle that husbands and wives could not, in any case, be admitted as witnesses for or against each other independently of the question of interest. None of our statutes have changed the rule in this respect as to the attestation of wills, and the rule applies to such attestation. As the wife of the testator, in this case, was not a competent witness when the will was executed, his death did not make her competent.”

In Virginia, Code of Va., § 3345, enacting that, “no person shall be incompetent to testify because of interest,” was qualified by § 3346, which declared that it should not affect “the competency of husband and wife as witnesses for or against each other during the coverture or after its termination”; and that “the competency of attesting witnesses to wills, deeds and other instruments shall be determined by the law in force the day before this Code takes effect.” But now, by Acts 1893-'94, c. 619, above cited, it is declared that husband and wife shall be competent witnesses for or against each other *in all civil cases*. If this was not intended to extend to wills, it should have been so stated in the *proviso* as a third exception to the two that are there made.

But Code of Va., § 3346, after abolishing the disqualification of interest, declares that this shall not affect the competency of attesting witnesses to wills, deeds, etc. It would seem to follow, therefore, construing Acts 1893-'94, c. 619, in connection with

would be entitled to any share of the estate of the testator, in case the will was not established, so much of his share shall be saved to him as shall not exceed the value of what is so devised or bequeathed." The statute destroys the interest of the devisee or legatee witness, and thereby makes him competent to prove the will for the benefit of the other devisees or legatees. By Code of Va., § 2530, *creditors* are competent, although the will may charge the estate with the payment of debts. And by § 2531, *executors* are competent.¹

§ 86. Effect of a Duly Executed Codicil on a Will not Duly Executed.—The effect is to establish the will as well as

Code of Va., § 3346, that husband and wife are now in the situation of persons no longer under a general disqualification to testify for or against each other in civil cases, but that they are still incompetent, as before the statute, as witnesses to wills, deeds, etc., just as if their general incompetency as witnesses had been removed by the Code of Va., § 3345 followed by § 3346, declaring that this should not affect the competency of subscribing witnesses to wills, deeds and other instruments. From this point of view, Code of Va., § 2529, so far as it relates to a will attested by a person to whose wife or husband any beneficial interest in any estate is thereby devised or bequeathed, remains unaffected by Acts, 1893-'94, declaring that, "husband and wife shall be competent to testify for or against each other in *all* civil cases."

¹ DEVISEE OR LEGATEE AS AN ATTESTING WITNESS.—In *Davis v. Davis*, (W. Va.), 27 S. E. 323, there is an elaborate discussion of Code of W. Va., c. 77, § 18 (the same as Code of Va., § 2529, *supra*), and it is held that if a will can be proved at the probate independently of the testimony of an attesting witness beneficially interested therein, a devise or bequest to such witness, or her husband, is not void. In this case, the will of Charles W. Davis was attested by Mrs. Delilah Davis, to whom and to whose husband, devises and bequests were made. The other subscribing witness (two being required) took nothing under the will. The will was probated upon the testimony of the disinterested witness; and a bill to declare void the legacies and devises to Delilah Davis and her husband was dismissed. The decision was placed on two grounds: (1) That there were two competent witnesses at the time of the attestation of the will; (2) That a will must be subscribed, but need not be proved, by two attesting wit-

the codicil, and the codicil amounts to a *republication* of the will, and brings it down to the date of the codicil, so that they both speak as of the date of the codicil. See *Corr v. Porter*, 33 Grat. 278; *Hatcher v. Hatcher*, 80 Va. 169; *Barney v. Hayes* (Mont.), 28 Am. St. R. 495; *Gilmor's Estate* (Pa.), 35 Am. St. R. 855; *Hobart v. Hobart* (Ill.), 45 Am. St. R. 151. But in order that the codicil may have this effect, the execution of the codicil must be such as would have sufficed for the will if the will had been so executed. Thus the following papers do not constitute a valid will in Virginia, No. 1 and No. 2, being offered together for probate:

nesses, even though the other attesting witness be alive and within the jurisdiction of the court. Hence, as in this case, the will *was* "otherwise proved," viz., by the other attesting witness, Mrs. Davis was not needed as a witness at the probate, and so her interest and that of her husband was not forfeited.

Upon the first point, it is conceded by the court that under the statute (Code of W. Va., c. 77, § 18; Code of Va., § 2514), there must be two witnesses *competent at the time of the attestation*. But the court says: "The only reasonable way to construe §§ 3, 18, c. 77, Code [Code of Va., §§ 2514, 2529], is that the word 'competent,' as used in each one of them, refers to the separate time to which they relate; the first to the attestation, the second to the proof of the will. Mrs. Davis was competent as an attesting witness. While she was interested in the will, the testator was alive, and if the question of the attestation had arisen during his life, they were both competent to testify in relation thereto. Hence, the word 'competency,' in so far as it relates to an attesting witness, excludes the question of interest, and has reference to age, sanity and moral integrity. As used in the eighteenth section, in relation to the proof of the will, it has reference merely to the question of beneficial interest, its object being to remove all motive for false swearing or forgery, and also the incompetency of the witness, occasioned by the death of the testator, thus throwing on the beneficiaries thereunder the burden of sustaining the will independently of their own testimony. If the will can be thus sustained, it is sustained as a whole, and not in parts, and none of the provisions are void, but all the beneficiaries take under it, even though the attesting witnesses were incompetent [*i. e.*, to testify at the probate] on account of interest. . . .

No. 1. "I, Elizabeth Holmes, do make the following as my last will and testament. I give all my estate, both real and personal, to my two sisters, Margaret and Sally." No. 1 is not in the handwriting of the testatrix, nor signed by her. About an inch below, on the same sheet of paper, is written the codicil.

No. 2. "As Margaret is dead, I give her share to my niece, Lizzie Leigh Gibson." This last was wholly in the handwriting of the testatrix, and signed by her. *Held*, that the codicil, No. 2, does not suffice to make No. 1 and No. 2 the will of Elizabeth Holmes; but it would have been otherwise if No. 1 had been wholly in the testatrix's handwriting, or if No. 2

The will is fully established by the other attesting witness. It might have occurred that the will could not have been established without the evidence of Mrs. Davis, and in such case to make her competent as against the heirs of the testator, her beneficial interest would have to be avoided." See *Croft v. Croft*, 4 Grat. 103, where there were two subscribing witnesses to a will, to one of whom the testator devised a tract of land. The other subscribing witness being dead, the will was probated on the testimony of the devisee witness, whose devise thereupon became void.

Whether the decision in *Davis v. Davis* will be followed in Virginia, remains to be seen. It is possible that it might be held that the subscribing witness who takes a benefit under a will is incompetent at the time of the attestation, and that both of the subscribing witnesses should be examined at the probate, if both are alive and within the jurisdiction of the court. The true view of the statute would then be that the words "if the will may not be otherwise proved" have reference to the case where the devisee or legatee is needed as an attesting witness, to make up the number required by law, in which case he is made a competent *attesting* witness by the avoidance of his interest, and he may also be called to testify at the probate of the will. And, conversely, a will may be otherwise proved when there is an extra or superfluous attesting witness, beyond the number required by the statute. This view would assimilate the law of Virginia to that of many of the other States. See Tiedeman, 1 Real Prop. § 878, where it is said: "The common law rule is, that if a witness to a will is interested in it as a legatee or devisee, the will is void. But now, in most of the States, it is provided by statute

had been attested by two witnesses. *Gibson v. Gibson*, 28 Grat. 440. See 1 Lom. Executors, 70; 1 Jarman on Wills, 228, 260; 1 Redf. on Wills, 260-'68; 1 Cr. & Mees, 42; 4 N. Y. 140; 39 Am. Dec. 469; 10 Am. St. R. 873, note. See *Darling v. Cumming*, 92 Va. 521; *Gordon v. Whitlock*, 92 Va. 723.

§ 87. **Initials.**—The *initials* of the testator's name are a sufficient signature in England, where all wills are required to be attested. *Quare*, in Virginia as to olograph wills not attested. See *McBride v. McBride*, 26 Grat. 476, where the point was left undecided.

§ 88. **Letters, etc., as Wills.**—A will can be in the form of a letter, deed, settlement, etc. If the writing contains a disposition of the signer's property to take effect after his death, it will be considered a testamentary act whatever the *form* of the instrument. But the identical paper must have intended as *itself* a disposition of the property, and this disposition must be such as the law deems testamentary, whether the signer so understood it or not. See *McBride v. McBride*, 26 Grat. 476, where a letter reciting the provisions of an unexecuted will was offered for probate as an *olograph* will, but was rejected on the ground that the very paper (*i. e.*, the letter) was not *intended* to be a disposition of property at all, the writer directing the letter to be *burnt*, and fully expecting to execute a formal will, but dying suddenly before he did so. See also *Hood v. Haden*, 82 Va. 588; *Smith v. Houseman*

that in such a case the will [shall] be good, but the devise or legacy to the witness shall be void. In some of the States, the devise is declared absolutely void, but generally the devise is void only when there is not a sufficient number of witnesses without the disqualified witness." And in Redfield, Wills, Vol. I., p. *258, note: "But in many of the American States, the statute only renders the estate of witnesses to a will, who take a beneficial interest under it, void to the extent of the number required to give validity to the instrument. And where supernumerary names appear upon the paper as witnesses, those will first be taken to complete the required number who take no benefit under the will."

(Va.), 20 S. E. 830; *Swann v. Houseman*, 90 Va. 816; *Clairborne v. Radford*, 91 Va. 527; *Roberts v. Coleman*, 37 W. Va. 143; *Estate of Knox* (Pa.), 17 Am. St. R. 798; *Hazleton v. Reed* (Kan.), 26 Am. St. R. 86; *Barney v. Hayes* (Mont.), 28 Am. St. R. 495. For a love letter probated as a will, see 1 Va. Law Reg. 627.

§ 89. **Time at Which a Will Speaks.**—A will of *personalty* “speaks” (*i. e.*, takes effect) at the death of the testator. But under the Wills Act of 32 Henry VIII., a devise of *land* was regarded as a *present* conveyance, and “spoke” as of its *date*. The consequence was that a devise of “all the testator’s land” passed only the land he owned at the date of the will, and *after-acquired land* could not pass. And so if the land owned at the date of the will was sold by the testator, and then repurchased by him before his death, it could not pass unless the will was republished after such repurchase. And a residuary devisee of the *residue of the lands not devised* could only take the residue of the testator’s lands owned at the date of the will, and not other lands subsequently acquired. And if any person to whom land was devised died in the testator’s lifetime, the *lapsed* devise could not pass to the residuary devisee, but descended to the heir at law. *Raines v. Barker*, 13 Grat. 128.

The above doctrines are all changed by the Wills Act of 1 Victoria. A devise now in England, like a will of *personalty*, speaks as at the *death* of the testator. Hence, a devise can now pass *after-acquired land*, and a *lapsed* devise does not pass to the heir, but goes to the residuary devisee. See Wms. R. P. (209). And in Virginia, by Code, § 2521: “A will shall be construed, with reference to the *real estate* and the personal estate comprised in it, to take effect and speak as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.” *Wildberger v. Check* (Va.), 27 S. E. 441. And by § 2524, it is provided that “unless a contrary intention appear by the will, such *real estate*, or interest therein, as shall be

comprised in such will, which shall fail, or be void, or otherwise incapable of taking effect, shall be included in the residuary devise, if any, contained in such will." Under these statutes in Virginia, (1) a devise can pass after-acquired lands; and (2) a devise which fails enures to the benefit of the residuary devisee. See *Stonestreet v. Doyle*, 75 Va. 356.

§ 90. **Lapsed Devises** (*i. e.*, when the devisee dies before the testator).

(a). Before 1 Victoria, in England, a fee-simple or a fee-tail to A would lapse by A's death before the testator, although A left heirs or heirs of his body, the devise being to A alone as the purchaser, and not to benefit his heirs.

(b). By 1 Victoria, no estate-tail shall lapse if the devisee leaves issue who survive the testator, but it shall take effect as if the devisee had died immediately after the testator, instead of before him. And a fee-simple to a *child* or *descendant* of the testator shall not lapse, if such child, etc., dying before the testator, leaves issue surviving the testator.

(c). Now in Virginia, by Code of Va., § 2523: "If a devisee or legatee die before the testator, leaving issue who survive the testator, such issue shall take the estate devised, or bequeathed, as the devisee or legatee would have done had he survived the testator, unless a different disposition thereof be made or required by the will." And under § 2523, where a testator bequeathed money to a sister who had died *before the execution of the will*, leaving issue who survived the testator; it was held that the legacy did not lapse, but passed to such issue. *Wildberger v. Cheek* (Va.), 27 S. E., 441.

§ 91. **Revocation of a Will.**

(a). By Code of Va., § 2517: "Every will made by a man or woman shall be revoked by his or her marriage, except a will made in the exercise of a power of appointment, when the estate thereby appointed would not, in default of such appointment, pass to his or her heir, personal representative, or next of kin." *Phaup v. Wooldridge*, 14 Grat., 332.

(b). By Code of Va., § 2518: "No will or codicil, or any part thereof, shall be revoked unless under the preceding section (*i. e.*, by *marriage*); or by a subsequent will or codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed; or by the testator, or some person in his presence, and by his direction, cutting, tearing, burning, obliterating, cancelling or destroying the same, or the signature thereto, *with intent* to revoke [*animo revocandi*]."¹

(c). By Code of Va., § 2519: "No will or codicil, or any part thereof, which shall be in any manner revoked, shall, after being revoked, be revived otherwise than by the re-

¹ REVOCATION OF WILLS.—See on whole subject, 28 Am. St. R., 344-362, note. As to revocation by mistake, see *Giddings v. Giddings* (Conn.), 48 Am. St. R., 192. As to revocation by marriage, see *Roane v. Hollingshead* (Md.), 35 Am. St. R., 438; also, *Hale v. Hale*, 90 Va., 728, where it is held that the mistaken view of a testatrix that her marriage subsequent to the execution of the will was not a revocation thereof does not estop her heirs from claiming that the will was revoked under § 2517. For a case where a deed of land in the testator's lifetime operated as a revocation of a prior devise of the lands, see *Collup v. Smith*, 89 Va. 258. Cf. Code of Va., § 2520.

In *Gordon v. Whitlock*, 92 Va., 723, it is held (as stated in the head note) that the mere fact of making a subsequent testamentary paper does not work a revocation of a prior one in the absence of express revocation, unless the two are incapable of standing together. A will need not be confined to one paper, but may consist of several testamentary papers of different dates, and executed and attested in different ways and at different times. The expression in a subsequent will: "This is my last will," is not entitled to any weight. If the subsequent paper is merely supplemental, it will be treated as a codicil; if partially conflicting, that of the later date will operate to revoke the former so far as the provisions of the two are conflicting or incompatible. But in the absence of a clause of revocation, the court will adopt that construction which will give effect to all the testamentary papers, if possible, sacrificing the earlier papers only so far as they are clearly irreconcilable with the latter. And see *Jenkins v. Lawrence*, 86 Va., 35.

execution thereof, or by a codicil executed in manner hereinbefore required, and then only to the extent to which an intention to revive the same is shown.”²

§ 92. **Lost Wills.**—A lost will can be probated provided there has once been a will duly executed, which, after the testator’s death, cannot be found because lost, or destroyed without intent to revoke, as if lost in an accidental fire. The contents of such lost will may be proved by *secondary* evidence, *i. e.*, by the testimony of witnesses familiar therewith. Thus the last will of Sir Edward Sugden (afterward Lord St. Leonards) was probated on the testimony of his daughter, Miss Charlotte Sugden, who had been his secretary. *Sugden v. Lord St. Leonards*, 1 Probate Div., 154. See also *Apperson v. Dowdy*, 82 Va., 776; *Dower v. Seeds*, 28 W. Va., 113; 84 Am. Dec. 628–631, note; *in re Ellis’ Estate* (Minn.), 43 Am. St. R., 514.

§ 93. **Testamentary Capacity.**—“It is not necessary that a person should possess the highest qualities of mind in order to make a will, nor that he should have the same strength of mind that he may formerly have had. The mind may be in

² The effect of § 2519 of the Code of Va. was considered in *Rudisill v. Rodes*, 29 Grat., 147. John Rudisill died in 1874, having, in his lifetime, made and published, successively, three wills, dated, the first on the 22nd day of January, 1868, the second on the 14th day of February, 1871, and the third and last in the month of April or May, 1872. The second contained a clause revoking all former wills, and the third contained a similar clause. The testator destroyed the third will *animo revocandi*, leaving the other two uncanceled; and the question arose whether, by the destruction of the third and last will, the second was revived. It was held, in an opinion by Judge Burks, that under the express language of § 2519 the destruction of the third will could not operate to revive the second; for the second had been revoked by the third, and after that could not be revived “otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and then only to the extent that an intention to revive the same is shown.”

some degree debilitated, the memory may be enfeebled, the understanding may be weak, the character may be eccentric, and he may even want the capacity to transact many of the ordinary business affairs of life. It is sufficient if he understands the nature of the business in which he is engaged, has a recollection of his property which he means to dispose of, the objects of his bounty, and the manner in which he wishes to distribute it among them." *Nicholas v. Kirchner*, 20 W. Va. 251. See also *Kerr v. Lunsford*, 31 W. Va., 659; *Hiett v. Shull*, 36 W. Va., 563; *Martin v. Thayer*, 37 W. Va., 38; *Young v. Barner*, 27 Grat., 96; *Montague v. Allan*, 78 Va., 592; *Chappell v. Trent*, 90 Va., 849. For full discussion of undue influence as affecting the validity of wills, see 31 Am. St. R. 670-691. For fraud in procuring wills, see *Tucker v. Sandidge*, 85 Va., 546; *Walters v. Walters*, 89 Va., 849.

§ 94. **Wills of Personalty.**—We have seen that the formalities for wills of realty and personalty are now the same in England and Virginia. And in connection with devises of land, it is convenient to consider briefly the administration of personal property, and the several sorts of legacies.

§ 95. **Personal Representatives.**—These are (a) Executors, and (b) Administrators. The executor is appointed by the *testator*, being named in the will; the administrator is appointed by the *court* when there is no will or no executor named. The title to all the personalty owned by a decedent at his death vests in his executor or administrator. *Brockenbrough v. Turner*, 78 Va. 438; *Perdue v. Dillon*, 89 Va. 182. But the executor or administrator, as such has nothing to do with the decedent's *real estate*. The title to real estate is at once in the *heirs* by descent. *Peirce v. Graham*, 85 Va. 227.

§ 96. **Who May be an Executor or Administrator?**—At common law an executor gave no bond, so an infant of seven-teen could be an executor. But as an administrator was required to give bond, no infant could be administrator. In Virginia a bond is required of both executor and adminis-

trator, so neither can qualify under twenty-one. 1 Tuck. Com. B'k 2, p. 411, n. (b). In Virginia the marriage of a woman who was a personal representative does not now operate *ipso facto* as an extinguishment of her authority; but the court in which she qualified shall revoke her powers on the motion of any surety on her bond; and may do so on motion of any person interested, or when it shall seem proper to the court. Acts 1891-'92, p. 333, ch. 208.¹

§ 97. **Who is an Executor de son Tort?**—One who becomes *liable* as if he were executor, by reason of his "intermeddling with the goods of the decedent," and so is called an executor *of his own wrong*. He is an executor *de facto*, though not *de jure*. Code of Va., § 2656; 2 Bl. Com. (507).

§ 98. **Temporary Grant of Administration.**—See 2 Bl. Com. (503). In Virginia the court appoints a *curator* of

¹ **CORPORATION AS EXECUTOR OR ADMINISTRATOR.**—By Acts 1897-'98, p. 238, ch. 215, the Richmond Trust and Safe Deposit Company is incorporated, and by § 6 the said company is "authorized and empowered to accept and execute, as fully as a natural person, trusts of any and every description which may be committed or transferred to it by any person or persons whomsoever, bodies corporate or public, upon such terms as may be agreed upon by and between the said company and said person, natural or corporate, or by any court in the State of Virginia, or by the courts of the United States, or of any of the States or territories thereof, or of the District of Columbia, or by last will and testament of any natural person; and in all cases when application shall be made to any court of this State for the appointment of any receiver, trustee, assignee, administrator, executor, guardian or committee of a lunatic, it shall and may be lawful for such court to appoint the said company such receiver, trustee, assignee, administrator, executor or guardian or committee of a lunatic; and the accounts of said company as such receiver, trustee, assignee, administrator, executor, guardian or committee, shall be regularly settled before the court making such appointment," etc. For further provisions, see the charter. And by Acts 1897-'98, p. 354, ch. 316, similar powers are conferred upon the Norfolk Trust and Safe Deposit Company, which is constituted a body corporate and politic.

the estate of the deceased during a contest about his will (*pendente lite*), or during the infancy (*durante minore ætate*) or during the absence (*durante absentia*) of an executor, or until administration of the estate be granted; taking from him a bond, in a reasonable penalty. The curator has, while the office continues, the general powers of an executor. Code of Va. § 2534.

§ 99. **Is the Executor of A's Executor Entitled to Act as the Executor of A?**—Yes, at common law. 2 Bl. Com. (506). No, in Virginia: "The executor of an executor shall have no authority, as such, to administer the estate of the first testator; but on the death of the sole surviving executor of any last will, administration of the estate of the first testator not already administered may be granted, with the will annexed, to such person as the court shall think fit to appoint." Code of Va. § 2643. Such an administrator would be described as an administrator *de bonis non* (d. b. n.) *cum testamento annexo* (c. t. a.); i. e., administrator of the goods not already administered, with the will annexed for his guidance. An administrator *de bonis non* must always be appointed in case the first administrator (or executor) did not *complete* the administration, and, if there be a will, he is further described as an administrator *de bonis non*, with the will annexed.

§ 100. **Powers of the Executor Before he Proves the Will.**—See 2 Bl. Com. (507). These powers are restricted in Virginia, because the executor must give bond. Code of Va. § 2636, enacts: "A person appointed by will executor thereof shall not have the powers of an executor until he qualifies as such by taking an oath, and giving bond, etc., except that he may provide for the burial of the testator, paying reasonable funeral expenses, and may preserve the estate from waste."

§ 101. **When the Will Appoints no Executor, Who is Entitled to Qualify as Administrator?**—See 2 Bl. Com. (504). In Virginia, by Code, § 2639: "Administration shall be granted to the distributees who apply therefor, preferring

first the husband or wife, and then to such of the others entitled to distribution as the court shall see fit. If no distributee apply for the administration within thirty days from the death of the intestate, the court may grant administration to one or more of his creditors, or to any other person." And if two months elapse without there being an executor or administrator (except during a contest over the decedent's will, or during the infancy, or absence of an executor) the court shall, on the motion of any person, commit administration to the sheriff. Code of Va. § 2645.

§ 102. **Probate of Wills.**—See 2 Bl. Com. (508). Code of Va. § 2533, *et seq.*, provides for the probate of wills of realty as well as of personalty. But see amendment of § 2533, by Acts 1887-'88, p. 16, c. 15, and also by Acts 1893-'94, p. 898, c. 781. As to recording a will, see Code of Va. § 2547, amended by acts 1897-'98, p. 492, c. 458, declaring that "it shall be the duty of the personal representative of the testator to cause a duly certified copy of any will, or of any authenticated copy, so admitted to record, to be recorded in the clerk's office of the county or corporation court of each county or corporation wherein there is any real estate whereof the testator died seised and possessed." For the effect of admission to probate, see *Connolly v. Connolly*, 32 Grat. 657; *Norvell v. Lessueur*, 33 Id. 222. For oath of executor, see Code of Va. § 2638. For oath of administrator, see § 2640. For the bond of an executor or administrator, see § 2641. But the will may exempt the executor from furnishing security. § 2642.¹

¹ **PURCHASER FROM AN HEIR AT LAW.**—By Acts of Virginia, 1891-'92, p. 239, c. 148, it is declared that "the title of a *bona fide* purchaser without notice and for valuable consideration, from the heir-at-law of a person who died having title to any real estate of inheritance in this commonwealth, shall not be affected by a devise of such real estate made by the decedent, unless within seven years after the testator's death, the will devising the same, or if such will has been proved without this State, an authenticated copy thereof, and the certificate of probate, shall be offered

§ 103. **Appraisement of Personal Estate.**—See Code of Va. § 2647. But the will may direct that no appraisement shall be made.

§ 104. **Inventory of the Personal Estate.**—See Code of Va. § 2673. For account of sales, see § 2674; for record of inventory of sales, see § 2675; for accounts of personal representatives, see § 2678, *et seq.*; for compensation of personal representatives (5 per cent. on receipts), see 4 Min. Ins. 1234-'35.

§ 105. **Powers of Personal Representatives.**—"It shall be the duty of every personal representative to administer well and truly the whole *personal* estate of his decedent." He has full power to sell the personalty in order to convert it into money to pay the debts due by the estate, and full power to sue for and collect all debts due to the estate. Code of Va. § 2648. And the executor may be authorized by the will to sell real estate for the payment of debts. See Code of Va. § 2663; also § 2666.

§ 106. **Liability of Personal Representatives.**—Unless he promises in writing to pay out of his own estate, he is only liable to pay the decedent's debts out of the decedent's assets. A judgment against a personal representative is *de donis testatoris*, not *de bonis propriis*. But if by his negligence, or improper conduct, he lose any debt or other money, he is personally liable for the principal and interest. And if a personal representative pay any debt the recovery of which could be prevented by reason of illegality of consideration (*e. g.*, usury), lapse of time (statute of limitations) or otherwise,

for probate before the court having jurisdiction for that purpose, and shall afterwards be admitted to probate and record in the proper court as a will of real estate. Provided, that if any devisee under such will is at the time of the testator's death an infant, or insane, the limitation created by this act shall not affect such infant or insane person until after the expiration of two years from the removal of his or her disability."

knowing the facts by which the same could be prevented, no credit shall be allowed him therefor. Code Va., § 2676. But in *Fauber v. Gentry*, 89 Va. 312, it is held that an administrator is chargeable with sums actually collected, and not with estimates made by him as to what might be collected on claims due the estate.

§ 107. Order in Which, on Deficiency of Assets, the Debts, of the Decedent are to be Paid.—See Code of Va., § 2660, as amended by Acts 1895-'96, p. 288, chap. 253. "When the assets of the decedent in the hands of his personal representative, after the payment of funeral expenses and charges of administration, are not sufficient for the satisfaction of all demands against him, they shall be applied:

"*First.* To claims of physicians not exceeding fifty dollars for services rendered during the last illness of the decedent, and accounts of druggists not exceeding the same amount for articles furnished during the same period.

"*Second.* To debts due the United States and this State.

"*Third.* To taxes and levies assessed upon the decedent previous to his death.

"*Fourth.* To debts due as trustee for persons under disabilities, as receiver or commissioner under decree of court of this State, as personal representative, guardian or committee, where the qualification was in this State, in which class of debts shall be included a debt for money received by a husband acting as such fiduciary in right of his wife.

"*Fifth.* To all other demands, except those in the next class; and

"*Sixth.* To voluntary obligations," [*i. e.*, bonds.]

No payment shall be made to creditors of any one class until the preceding class or classes shall be fully paid; and when the assets are not sufficient to pay all the creditors of any class, the creditors of such class shall be paid ratably. Code Va., § 2661. And by § 2665 *all real estate* of a decedent is assets for the payment of his debts; and shall be applied to their payment in the same order as personalty, except when

such real estate is made *equitable* assets by a will which charges it with the payment of the debts, or devises it subject to their payment. See Bisph. Eq. § 532; *Deering v. Kerfoot*, 89 Va. 491.

§ 108. **Order in Which, on Sufficiency of Assets, the Decedent's Property is to be Applied to the Payment of his Debts.**—For the English order, see Bispham's Equity, § 346. The order in Virginia is as follows:

First. Personalty not bequeathed, nor expressly nor impliedly exempted. *Scott v. Ashlin*, 86 Va. 581; *New v. Bass*, 92 Va. 383.

Second. Realty devised for payment of debts.

Third. Realty not devised, but allowed to descend to the heir at law.

Fourth. General pecuniary legacies (*i. e.*, legacies of money, as \$1,000 to A").

Fifth. Personalty specifically bequeathed, as, *e. g.*, "my gold watch to A."

Sixth. Realty devised, as, *e. g.*, "Blackacre to A and his heirs forever." *Alexander v. Byrd*, 85 Va. 690.

In the above table, if No. 1 will pay all debts, nothing else must be touched, as No. 1 is *first* liable. So if Nos. 1, 2 and 3 will pay all debts, Nos. 4, 5 and 6 are exempt. And No. 6, land devised, must never be touched until all other property is exhausted. See *Elliott v. Carter*, 9 Grat. 549; *Murphy v. Carter*, 23 Grat. 477; *Edmunds v. Scott*, 78 Va. 720. For the order of liability of land devised to A, but subject to a charge for the payment of debts, see Bisph. Eq. 346. For the order of liability of mortgaged land, descended to the heir, or devised to another, see Adams' Eq. (263), (264); Bisph. Eq., §§ 346, 348; *Carter v. Barnardiston*, 1 P. Wms. 505 (cited in *Elliott v. Carter*, 9 Grat. 541, 551), *Daniel v. Leitch*, 13 Grat. 155. As to property over which the testator has exercised a general power of appointment in favor of a volunteer, see *Freeman v. Butters* (Va.), 26 S. E. 845.

§ 109. **Effect of a Creditor's Appointing his Debtor his Executor.**—At common law it was a discharge of the debt. 2 Bl. Com. (512). *Secus*, now in Virginia. "The appointment of a debtor as executor shall not extinguish the debt." Code of Va., § 2648.

§ 110. **Right of Retainer by Executor, or Administrator among Debts of Equal Degree.**—See 2 Bl. Com. (512). There is no such right in Virginia, but the personal representative must take his proportion like any other creditor. Code, § 2661.

§ 111. **The Different Sorts of Legacies.**—There are three kinds, viz., *general, specific and demonstrative*. See 8 Am. St. R., 720-726, note.¹

¹ DEMONSTRATIVE LEGACIES.—In 2 Redfield on Wills, 462, it is said: "There is an intermediate class of legacies, between general and specific legacies, where a certain amount of money is given to come out of a particular fund. These are sometimes called, after the denomination in the civil law, demonstrative legacies. This class of legacies is not liable to be adeemed, and so [to] fail by the fund being called in or changed, but is still payable out of the general assets. In this respect it partakes more of the nature of a general legacy. But in another particular, in that it is not liable to abatement, when the funds are insufficient to meet all the legacies, it partakes more of the nature of a specific legacy." And in 3 Pom. Eq., § 1133: "Demonstrative legacies are a peculiar kind, which partake of the nature of both specific and general legacies, and combine the advantages of both. . . . Their effect is peculiar. Although made primarily payable out of a particular fund, these legacies do not fail—are not adeemed—because such fund may not exist as a part of the testator's estate at his death, but they are then payable out of his general assets like general legacies. On the other hand, if such particular fund is in existence as a part of the testator's estate at his death, they are not liable to abatement in common with general legacies, but are entitled to payment under the circumstances in exactly the same manner as true specific legacies." See to same effect, 8 Am. St. R., 724, note. And see 2 Redfield on Wills (467), where cases are cited showing that a demonstrative legacy is liable to abate with the general legacies when it becomes a general legacy by the failure of the fund out of which it is payable;

(a) A *general* legacy (called also *pecuniary*) is a gift of a certain sum of money to be paid out of the assets of the testator's estate *generally*, no fund being designated as the means of payment. For example, "I give and bequeath to A the sum of \$1,000." Unless such legacies are, expressly or impliedly, *charged* on real estate, they are payable out of the personality only. *Couch v. Davis*, 23 Grat., 62, 94; *Allen v. Patton*, 83 Va., 255; *Lee v. Smith*, 84 Va., 289; *Lee v. Lee*,

and that a demonstrative legacy must also abate with general legacies as to the *balance* not paid by the particular fund.

As to what are demonstrative legacies, Pomeroy (3 Eq. Jur., § 1133, n. 2) gives the following examples: "Gifts of specified sums or amounts payable *out of* a mass of property, real or personal; gifts of a particular sum out of or from a specified amount of stock, or out of, or a share of, the capital employed in a certain business; a bequest of money now vested in particular bonds or securities, or of a sum to be paid by and out of moneys due to the testator on a bond or other security." See *Dunford v. Jackson* (Va.), 22 S. E., 853, and *Dunn v. Renick* (W. Va.), 22 S. E., 66, where the demonstrative legacies were payable out of the proceeds of lands ordered to be sold by the testator.

As to contingent legacies, see full discussion in 10 Am. St. R. 471-479, note. Also see *Effinger v. Hall*, 81 Va. 94; *Sellers v. Reed*, 88 Va. 377; *Jones v. Habersham*, 107 U. S. 174.

As to interest on legacies, it is the rule that a general legacy begins to bear interest one year after the death of the testator. This is said to be because a general legacy is *payable* one year from the testator's death. See 13 Am. & Eng. Ency. Law (1st ed.), 167, note 1, where it is said: "The reason of the rule is, that interest is payable from the time a legacy ought to be paid until the date of payment, as compensation for the detention. A general legacy, as already pointed out, is payable one year after the testator's death; hence, if not paid, interest runs from that period. Hence, it would seem, that in States in which the legacies are payable one year from the date of the executor's letters, and not from the testator's death, the interest should begin to run from that time [*i. e.*, from the date of the letters]. In some States it has been so held, but in others, the statutes changing the time of payment to one year after the grant of letters are held to have no effect upon the payment of interest." See cases cited.

88 Va., 805; *Smith v. Mason*, 89 Va., 713; *Bird v. Stout* (W. Va.) 20 S. E., 852. But if the personal property is exhausted in the payment of the debts, then such legacies, by the doctrine of *marshalling*, are payable out of land devised to pay debts, and land descended to the heirs. The advantage of a general legacy is that it is not liable to be lost by *ademption* (*i. e.*, to be sold by the testator, or lost or destroyed in his lifetime), as a specific legacy is; its disadvantage is that it is taken to pay the debts before the other legacies are touched.

(b). A *specific* legacy is a bequest of a particular thing, as a horse, a piece of plate, money in a certain purse, etc. Its advantage is that it is not liable for debts until *general pecuniary* legacies are exhausted; its disadvantage is that it is liable to *ademption*, as explained above.

(c). A *demonstrative* legacy is a legacy of *quantity*, with a particular fund pointed out for its satisfaction; as, "I bequeath to A \$1,000 to be paid out of the proceeds of my stock in the bank of Rockbridge." A demonstrative legacy so far

By Code of Va., § 2706, it is declared that "a personal representative shall not be compelled to pay any legacy given by the will, or make distribution of the estate of his decedent, until after a year from the date of the order conferring authority on the first executor or administrator of such decedent." And in *Moorman v. Crockett*, 90 Va. 185, it is stated in the head-note that under this statute a legacy in Virginia does not bear interest until one year after the executor's qualification. But it seems that this question did not arise in the case, the point decided being that a legacy does not bear interest from the death of the testator, except in certain exceptional cases, and the attention of the court, as far as appears, was not directed to the effect of the statute as changing the running of interest from one year after the testator's death to one year after the executor's qualification. The question may be considered, therefore, still open; and it is believed to be the better opinion, that the statute does not change the old rule, and that a legacy in Virginia bears interest after one year from the death of the testator.

For the exceptional cases in which a legacy begins to bear interest immediately on the testator's death, see 2 Bl. Com. (Sharswood's ed.) (514), n. 38; 13 Am. & Eng. Ency. Law, 170.

resembles a *general* one as not to be liable to *ademption*; *i. e.*, if the fund for payment fails, the legacy is not lost, but the legatee will be permitted to receive the amount out of the general assets. On the other hand, it so far resembles a specific legacy that it is not liable, if the particular fund is in existence, to abate with the general legacies on deficiency of assets. So it has the double advantage of escaping both *ademption* and *abatement*. See *Morris v. Garland*, 78 Va., 215; *Brown v. Brown*, 79 Va., 648; *Stokes v. Mitchell*, 80 Va., 149; *Effinger v. Hall*, 81 Va., 94; *Hood v. Haden*, 82 Va., 588; *Lee v. Smith*, 84 Va., 289; *Dunford v. Jackson* (Va.), 22 S. E., 853. See *Dunn v. Renick* (W. Va.), 22 S. E., 66.

CHAPTER VII.

CONVEYANCES.

I.—Modes of Conveyance.

§ 112. **Conveyances at Common Law.**—Under the rigid rules of the common law, based on feudal principles, the transfer of the legal title to land could only be accomplished by *livery of seisin*; i. e., the delivery of possession of the land by feoffor to feoffee. A *deed* of feoffment was unnecessary as the land *lay in livery*, not in *grant*. But livery was required on conveyances of *freehold* estates only, as those less than freehold (terms of years, chattels-real) did not involve the *seisin* (*feudal* possession). Hence a lease for years required no livery of seisin, but was completed on the *lessee's entry*, as we have seen. 2 Bl. Com. (104), (144), (310); Wms. R. P. (17th ed.), 174, 563.

§ 113. **Conveyances Operating Under the Statute of Uses.**—These are three in number, viz: *covenant to stand seized*; *bargain and sale*; and *lease and release*. The importance of these conveyances during the period which elapsed between the Statute of Uses, 27 Hen. VIII., c. 10, and the statute by which lands were made to lie in grant (1536–1845), can scarcely be over-estimated. They may still be employed, and their *operation* must be well understood. See § 115, *infra*; 2 Bl. Com. (338).

§ 114. **The Statute of Uses.**—This famous statute did not forbid uses to be declared or *raised* (i. e., created by implication when not expressly declared), nor pronounce them illegal; indeed, its language shows clearly that it contemplated that uses would continue to be declared or raised. See for the

full text of the statute, Tied. R. P., p. 363, note 1. But the great object of the statute was to abolish the jurisdiction of the Court of Chancery over landed estates, and to restore the jurisdiction of the common law tribunals. This jurisdiction chancery had obtained by its recognition of uses, which the common law ignored. Hence, it was determined to link, by an indissoluble bond, the *legal title* to the *use*, by giving to every man who had a use the "lawful seisin and possession." Chancery had enforced uses because the common law courts refused to recognize them; the statute made them *legal* estates; and by giving them full recognition *at law*, sought to take from the court of chancery all ground for interference.

The statute in substance enacts: When any person stands seised of land to the use of another person, he who has the *use* (the latter) shall be deemed in *lawful seisin* and possession of *the land* for the same estate in the land that he has in the use. Whenever the statute operates on a use, and turns it into a legal title, the use is said to be *executed*. But in the construction of the statute, the courts held that a use was not executed in these three cases: (a) When the use was a *use on a use*; i. e., a use *after* a prior use. Tyrrell's case, Dyer, 155 a; (b) When no one stood *seised* to the use; and (c) When the use was *active*. For explanation, see 2 Bl. Com. (336). As to uses for terms of years, there is danger of misapprehension. The statute says that *he who has the use (cestui que use)*, shall be deemed in lawful seisin and possession, provided some person (*feoffee to use*) stands *seised to the use*; and no one can stand *seised* of a *term of years*. Hence, if A conveys a term of one hundred years to B to the use of C, the use is not executed; for B is not *seised* to the use. But if A, seised in fee-simple, conveys his land to B and his heirs to the use of C for one hundred years, C's use is executed, for B has the seisin and is seised to C's use, though the use itself is a chattel interest. In other words, it is not necessary that the *use* be freehold; what is required is that there shall be a *feoffee to use*, if a conveyance is made, or a person *seised* to the use, as when the owner of the land retains it, and becomes

himself *seised to the use of another* as in deeds of covenant to stand seised, and of bargain and sale. See 78 Am. Dec. 406-410, note.

All uses not *executed* by the Statute of Uses, and thereby made *legal* estates, are enforced in chancery as *equitable* estates, and are now called *trusts*. And though the use was not active, and though there was a feoffee to use, yet any one who desired to evade the statute, and to create a use it would not execute, could easily do so. He had but to make the use a *second* use, and the aim was accomplished; for a use on a use is not executed, as we have seen. Thus, suppose A wants C to hold the legal title for use of D. Then he would convey to B and his heirs to the use of C and his heirs, to the use of D and his heirs. Or it can be done thus: A conveys unto *and to the use of* C and his heirs, to the use of D and his heirs. Thus by the addition of "and to the use of," the Statute of Uses is made inoperative. Wms. R. P. (17th ed.), 207-'8.

But while the Statute of Uses was thus evaded, and so failed utterly in withdrawing lands from the jurisdiction of chancery, it effected other results of the utmost importance. It was the potent instrument to unfetter land from the rigid rules of common law conveyancing; and it gave to the owner of land something approaching the present facility of transfer, and complex methods of alienation. For under it originated three deeds of conveyance, covenant to stand seised, bargain and sale, and lease and release, whereby the *legal title* to freehold estates could be transferred without livery of seisin and under it a fee can be mounted on a fee, and a freehold made to commence *in futuro*, which the common law forbids. *Ocheltree v. McClung*, 7 W. Va. 232.

§ 115. Operation of Covenant to Stand Seised, Bargain and Sale, and Lease and Release.

(1). *Covenant to stand seised.* A man, having a *freehold* estate in land, executes a deed whereby he covenants to stand seised of his land, at once, or at some future time, to the use of his wife, son, etc. Thus a *use* is created in favor of the

covenantee (wife, son, etc.), who, having the use, is deemed, by the Statute of Uses, to be in lawful seisin and possession. Thus the legal title is transferred. But the consideration must be *blood or marriage*.

(2). *Bargain and sale*. A owns Blackacre, and contracts to sell it to B, and B pays A the purchase money (bargain and sale). But no livery is made to B. Then, in equity, A stands seised of Blackacre *to B's use*, and B, having the use, is, by the Statute of Uses, deemed to be in lawful seisin and possession. So the legal title was transferred from A to B without livery, and without writing. This was considered so much against public policy, as preventing the necessary *notoriety* in the conveyance of the land, that another statute (called the Statute of Enrollments) was passed soon after the Statute of Uses (in the same year) which declared that a bargain and sale of any estate of *freehold* or of *inheritance* in land should be by *deed*, which deed should be *recorded*, the record being considered to give publicity, as a substitute for the notoriety of livery of seisin. See 2 Bl. Com. (338).

(3). *Lease and release*. The English people seem never to have fancied the registration of deeds, and deeds of bargain and sale of *freeholds* would not operate without it, after the Statute of Enrollments. But suppose it was wished to avoid livery of seisin, and so to escape publicity in the conveyance of land. This purpose was accomplished by an astute lawyer who invented conveyances by *lease and release*. At common law, one who had leased land to another for a term, say one year, could release the reversion in fee to the lessee by a deed of release, and thus convey to the lessee the entire fee-simple without livery, provided the lessee first *made entry* upon the land. Without entry the release was void. But the entry gave *publicity*; and the problem was, under the Statute of Uses, to make a lease and release work without *actual entry*. Nothing was easier when once thought of. A has land which he desires to convey in fee-simple to B by a *secret* conveyance. He makes a lease to B for one year for a valuable considera-

tion. This is a bargain and sale of the land to B for one year; and, therefore, as explained above, A *stands seised* of his land to the use of B for one year. Then, by the Statute of Uses, B, *having the use*, is deemed to be in lawful possession. Now, by the statute, B has *possession without entry*; and so a *release* can at once be made to him by A of his reversion in fee-simple, which gives B the entire interest. The release is simply by a deed of grant, as a reversion after a term of years is considered incorporeal, and so lies in grant, and does not require livery. So, by the double process of lease and release, both entry on the land and livery of seisin are avoided. And as the lease by bargain and sale was of a term only, and not of a *freehold*, it did not come under the language of the Statute of Enrollments, and hence *lease and release* was a *secret conveyance*. Wms. R. P. 236-'37.

§ 116. **The Statute of Uses in the United States.**—The statute is in force in most of the States. See Bisph. Eq., § 55. But in Virginia there is no general statute of uses. Code of Va., § 2426 enacts: "By deed of bargain and sale, or by deeds of lease and release, or by covenant to stand seised to the use, or deed operating by way of covenant to stand seised to the use, the possession of the bargainor, releasor, or covenantor, shall be deemed transferred to the bargainee, releasee, or person entitled to the use, for the estate or interest which such person has in the use, as perfectly as if the bargainee, releasee or person entitled to the use had been enfeoffed with livery of seisin of the land intended to be conveyed by such deed or covenant." And by § 2427, a *release* is made effectual without the execution of a lease. It will be seen that this statute merely gives effect to the three deeds of bargain and sale, lease and release, and covenant to stand seised, and does not, like the English statute, declare that *whenever any person stands seised to the use of another, the use shall be executed*.

Hence, in Virginia, if A grants land to B and his heirs, to the use of C and his heirs, C's use is not executed (though a first use), and is enforced in equity as a *trust*. *Bass v.*

Scott, 2 Leigh, 356; *Jones v. Tatum*, 19 Grat. 720, 733; 2 Min. Ins. (4th ed.) 217, 824; 3 Va. Law Reg. 732. It was perhaps thought idle to follow the English statute, whose purpose was so easily evaded by the device of a second use, or, more probably, it was not thought desirable to abolish equitable estates in lands, by turning all uses into legal titles. And so the Legislature contented itself with reaping the substantial benefits of the Statute of Uses in giving effect to the three deeds operating under it, thus dispensing with livery of seisin. As to mounting a fee upon a fee, and commencing a freehold *in futuro*, these are provided for in Virginia by special statutes, without reference to uses. See C. V., § 2418.

§ 117. **The Statutory Deed of Grant.**—At common law a deed of grant could be employed to transfer *incorporeal* realty only, which was said, therefore, to *lie in grant*. 2 Bl. Com. (317). But by 8 and 9 Vict., ch. 106, § 2 (taking effect October 1, 1845), it was declared that “all *corporeal* tenements and hereditaments, as regards the conveyance of the *immediate freehold* thereof, shall be deemed to lie in grant, as well as in livery.” And the Virginia statute, taking effect July 1, 1850, enacts as follows: “All real estate shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery,” § 2417. The above statutes make a deed of grant as effective as if livery were made. But livery without deed is no longer sufficient in Virginia. For by Code § 2413 it is declared: “No estate of inheritance or freehold, or for a term of more than five years in lands, shall be conveyed unless by deed or will.” Thus in Virginia livery is dispensed with, and a deed is made necessary to convey a freehold for a term of more than five years. So lands now lie in grant, *i. e.*, pass by deed sealed and delivered. And this is the culmination of conveyancing.¹

¹ REQUISITES FOR A DEED.—As to what amounts to a seal in Virginia, see 1 Va. Law Reg. 622; 3 Id. 279; *Bradley Salt Co. v. Norfolk, etc., Co.*, 3 Id. 722, and note, p. 728. As to whether a deed must be *signed* as well as sealed, see Wms. R. P. (17th ed.), 184—

§ 118. *Ut res magis valeat quam pereat* as applied to **Deeds.**—We have seen that deeds of bargain and sale, lease and release (which is merely a bargain and sale of a term by the owner of a freehold, followed by a release of the freehold), and covenant to stand seised, are given effect by the Va. Statute of Uses. But it may happen that these deeds can only have the effect intended by being construed as *grants*. The deed of bargain and sale requires a pecuniary consideration to raise the use; a covenant to stand seised requires the meritorious consideration of blood or marriage. The presence of one or the other of these considerations is necessary to the validity of a deed which is to take effect under the Statute of Uses. Wms. R. P. (202) n. 1. *Jackson v. Sebring*, 16 John., 515.¹ But a deed of grant requires no consideration of money

'85; 1 Devlin on Deeds, § 231; Tiedeman R. P., § 807; 2 Min. Ins. (4th ed.) 727-'28, 849, 928. It is certain that a deed did not require to be signed at common law. In 2 Min. Ins. 728, it is said to be very questionable whether, as a general proposition, a deed in Virginia requires to be signed as well as sealed. And it is added: "Our statute of *conveyances* (V. C. 1873, ch. 112, § 1; V. C. 1887, ch. 107, § 2413) declares that no estate of inheritance, or of freehold, or for a term of more than five years, shall be conveyed unless *by deed* or will, leaving what constitutes a *deed* to be determined by the general principles of the law. But in the case of a *married woman's* conveyance (except of her separate estate accruing to her by the Married Woman's Law) it is expressly declared that it shall be signed by both husband and wife. (V. C. 1873, ch. 117, § 4; V. C. 1887, ch. 111, § 2502; Id. ch. 103, § 2286.) However, as it is customary to *sign* as well as to *seal* deeds of all kinds, it would be very imprudent to depart from the usage."

For full discussion of *delivery* of a deed, see 53 Am. St. R. 537-556, monographic note.

¹ CONSIDERATION FOR DEED OF BARGAIN AND SALE.—In *Ocheltree v. McClung*, 7 W. Va., 232, 239, it is said: "When a person by deed, in consideration of anything valuable, bargains and sells land to another, though by the common law the legal estate is not affected, but a mere equitable use is created, by force of the statute the legal estate is transferred to the bargainor. Any such consideration, however small, is sufficient to support the conveyance. And the acknowledgment in the deed that the consideration is

or blood, not even, as in the case of the ancient feoffment, to repel the presumption of a resulting use (or trust), which will not now arise from the mere fact that a deed is without consideration, unless there are other circumstances which show that the grantee was not intended to take beneficially. 2 Min. Ins. (4th ed.), 778; Bisp. Eq. § 90. Wms. R. P. (183), n. 1. Now it is a rule that if a deed cannot operate as intended, it may, nevertheless, operate in another way if the requisites therefor are present, *ut res magis valeat quam pereat*. Hence, if a deed intended to operate under the Va. Statute of Uses should fail to do so for the want of the proper consideration, it would still serve to pass the title by way of grant. *Rowletts v. Daniels*, 4 Munf., 473; *Watts v. Cole*, 2 Leigh, 662; 2 Lom. Dig. (81); 2 Min. Ins. (4th ed.), 780.

§ 119. **Form of a Deed of Grant in Virginia.**—"This deed made the day of, in the year, between (here insert names of the parties), *witnesseth*, that in consideration of (here state the consideration) the said doth (or do) grant unto the said all, etc. (here describe the property, and insert covenants, or any other provisions.) Witness the following signature and seal (or signatures and seals)." See Code, § 2437.¹

paid is conclusive of the fact so far as to give effect to the conveyance." And in 2 Min. Ins. (4th ed.), 807, it is said: "The consideration, if valuable, may be a trifling one, and the actual amount need not be stated; nor, if it be expressed in the deed, need it be actually paid, no averment or proof to the contrary being admitted. Indeed, it seems not absolutely necessary that the consideration should be mentioned at all in the deed, as extrinsic proof of any consideration, *not inconsistent with the deed*, is admissible."

¹ **DEEDS OF GRANT.**—When a deed is executed by the grantor, with a blank for the name of the grantee, there is conflict upon the question whether such blank can be filled, and the deed made operative, by an agent of the grantor, if the agent's authority be *by parol*; *i. e.*, not by deed. In *Preston v. Hull*, 23 Grat. 600, the

§ 120. **Construction of Deeds.**—In *Brine v. Insurance Co.*, 96 U. S., 627, it is held that the laws of the State in which land is situated control exclusively its descent, alienation and transfer, and the effect and construction of instruments intended to convey it.

subject is elaborately examined, and the conclusion reached that in such case the deed is inoperative unless the agent's authority is under seal. But in *Lafferty v. Lafferty* (W. Va.), 26 S. E. 262, it is held that a blank in a deed left for the name of the grantee may be filled, and the deed made effectual, by an agent under authority by parol given by the maker of such deed; and the decision in *Preston v. Hull* is disapproved. And see *Cribben v. Deal*, 21 Oreg. 211 (28 Am. St. R. 746), where it is held that when a deed is executed and acknowledged by the grantor, with a blank left therein for the name of the grantee, the grantor may, by parol, authorize a third person to insert the name of such grantee, and when so filled out and delivered, it becomes a valid deed.

In *Allen v. Withrow*, 110 U. S. 119, it is said: "The deed in blank passed no interest, for it had no grantee. The blank intended for the grantee was never filled, and until filled the deed had no operation as a conveyance. It may be, and probably is, the law in Iowa, as it is in several States, that the grantor in a deed conveying real property, signed and acknowledged, with a blank for the name of the grantee, may authorize another party, by parol, to fill up the blank. *Swartz v. Ballou*, 47 Ia. 188; *Van Etta v. Evenson*, 23 Wisc. 33; *Field v. Stagg*, 52 Mo. 534. As said by this court in *Drewry v. Foster*, 2 Wall. 24, at p. 33, 'although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion at this day is that the power is sufficient.' But there are two essential conditions to make a deed thus executed in blank operate as a conveyance of the property described in it; the blank must be filled by the party authorized to fill it, and this must be done before or at the time of the delivery of the deed to the grantee named. Allen, to whom it is stated the deed was handed, with authority to fill the blank, and then deliver the deed, gave it to his wife without filling the blank, and she died with the blank unfilled."

There is also conflict on the question whether if a person signs, seals, and delivers a deed, he is bound by it as an operative conveyance of his estate, although he is not named in it as grantor. For full discussion of the subject, see 1 Devlin on Deeds, §§ 194—

When land is conveyed by general description, extrinsic evidence is admissible to ascertain the location of adjoining tracts called for, so as to apply the conveyance to its proper subject-matter. *Sulphur Mines Co. v. Thompson*, 93 Va., 293. In questions of boundary, when the courses and distances vary from the natural boundaries or monuments set out in the deed, the latter are to be preferred in ascertaining the identity of the tract. 1 Greenl. Ev., § 301; *Norfolk Trust Co. v. Foster*, 78 Va., 413; *Reusens v. Lawson*, 91 Va., 226. Particular boundaries given general description of land; and a false description is rejected, and the instrument takes effect if a sufficient description remains to ascertain its application.

204. In § 204, the author states his own opinion: "Now, if a party signs a deed, he must do it for some purpose. It is in practice the general custom for deeds to be drawn by others than the parties to them. The scrivener may have omitted the name of the grantor, or by mistake may have inserted a wrong name. If such should be the case, and a party should sign a deed, intending to bind himself, all parties supposing he had executed an effectual conveyance, is it reasonable to say that the deed is nugatory because the party signing was not named in the conveyance? The fact that he signs and delivers the deed, should be entitled to greater consideration in determining whether he intended to convey his title, than the writing of his name in the deed by some one else. . . . While it may well be that in such a case he should not be conclusively bound, yet we think that by his signature and delivery of the deed he should be held presumptively to have assented to its provisions; or at all events, that his intention should be considered so uncertain and ambiguous that the court should, by reference to all the circumstances, not tending to contradict the deed, but to explain the conditions surrounding its execution, attempt to ascertain his meaning."

The opposite view is taken by the Supreme Court of the United States, and by a majority of the State courts. See *Bank v. Rice*, 4 How. 225; *Batchelor v. Brereton*, 112 U. S. 396; and cases cited by Devlin, *ubi supra*, from Massachusetts, Maine, Ohio, Alabama, and Indiana. But the rule approved by Devlin, that if a person signs, seals, and delivers a deed, he is bound by it, though not named as grantor, is said to be the law in New Hampshire, Mississippi and California. West Virginia follows the law as laid

It is immaterial whether the true or false description of land be placed first. The courts will reject the false wherever found, and give effect to the intention of the parties when so expressed as to enable the premises intended to be conveyed to be identified. This is the rule of construction *falsa demonstratio non nocet cum de corpore constat*. 1 Greenl. Ev. § 301; *Hunter v. Hume*, 88 Va., 24; *State Savings Bank v. Stewart*, 93 Va., 447. Where a map of land is referred to in a deed for the purpose of fixing its boundaries, it is the same as if it were copied into the deed. *State Savings Bank v. Stewart*, *supra*. For a case where parol evidence was inadmissible to vary the words of the deed, see *Holston, &c., Co. v. Campbell*, 89 Va., 396. For a case in which the description in the deed was held too vague and indefinite to pass title to any tract of land, see *George v. Bates*, 90 Va., 839.

§ 121. **Deeds Poll and Indentures.**—A *deed poll* is executed by only one party, and it is in the nature of a declaration made by him of his acts or obligations to some other person. Thus a deed of grant executed by the grantor alone is a deed poll. An *indenture*, or deed *inter partes*, is an agreement under seal, between two or more persons, both executing

down by the Supreme Court of the United States. See *Adams v. Medsker*, 25 W. Va. 127, 131, where it is said by Snyder, J.: "I have no hesitation in deciding that said deed did not convey the interest of Morgan Lyons. While he signed and acknowledged it as his deed, he is nowhere mentioned in it, or made a party to it. Neither his signature to, or acknowledgment of it, states or indicates whether he so signed and acknowledged it as grantor or grantee. But if this were otherwise, and it appeared that he intended to be a grantor, it could not be held to be his deed. It is elementary law that every deed must have a grantor as well as a grantee. No one who is not a party to the deed can be bound by it, or by its covenants. And no one can be a party who is not mentioned or referred to therein. The mere signing and acknowledging it, when there are grantors named in it, is insufficient to make the person so signing it a party to it, even though it appear by extrinsic evidence that he intended thereby to make it his deed."

the instrument, and entering into reciprocal obligations with each other. If it be a deed of conveyance, the grantee signs and seals as well as the grantor. And there may be various covenants, some binding on the grantor and others on the grantee, as is the case with the usual covenants in a lease. At common law, it is a rule that if a conveyance be by indenture, no one not a party to it can take by it any *present* estate in possession, although a *remainder* may be well limited to a stranger, *i. e.*, to one not a party. Wms. R. P. (17th ed.), 183; 2 Min. Ins. (4th ed.), 901. And at common law the covenants in an indenture were only available between the parties to it and their privies, and a third person could not maintain an action of covenant upon it. But at common law a person, though not a party to a deed poll, could sue upon it if the instrument showed upon its face that it was made for his benefit. *Ross v. Milne*, 12 Leigh, 204; *Jones v. Thomas*, 21 Grat., 96; *Stuart v. James River, etc., Co.*, 24 Grat., 96; *Newberry Land Co. v. Newberry* (Va.), 27 S. E., 899. But now in Virginia By Code, § 2415, it is provided: "An immediate estate or interest in, or the benefit of a condition respecting, any estate, may be taken by a person under an instrument, although he be not a party thereto; and if a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain, in his own name, any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise."

In *Newberry Land Co. v. Newberry*, *supra*, it was said, with reference to the portion of the statute referring to a covenant or promise: "If one of the objects of the statute was to abolish the distinction between deeds *inter partes* [indentures] and deeds poll in the respect referred to, and to bring the former within the rule of the common law applicable to the latter, it was clearly not intended to change that part of the rule that only a person named or definitely

pointed out in a deed as the beneficiary, can sue thereon; and this was not its effect. The statute does not enable one who is not a party to a deed to maintain an action thereon unless he is plainly designated by the instrument as the beneficiary, and the covenant or promise is made for his sole benefit." And see *Johnson v. McClung*, 26 W. Va., 659.

§ 122. **Deeds Made by an Attorney in Fact.**—At common law an attorney in fact, in order to make the deed that of his principal, must make and execute it *in the principal's name*. See for full explanation of the reason of the rule, 5 Bac. Abr. *Leases* (I.), 10, p. 571. As to the *body of the deed*, it is essential that the language should be, P (principal) grants or covenants by A, his attorney, and not that A grants, or covenants, as attorney for P. And the seal must be the principal's seal, and the deed must be delivered as the principal's. But as to the signing of the names and the *place* of the principal's seal, two modes are admissible. The deed may be signed P [seal], by A, his attorney (which is the best way), or A [seal], attorney for P, or For P, A [seal]. But in the body of the deed, the form must be: P [seal] by A, his attorney, as was said above. *Combe's Case*, 9 Co. 75 a; *Wilks v. Back*, 2 East 142; *Clarke v. Courtney*, 5 Pet. 349; *Jones v. Carter*, 4 H. & M. 184; *Martin v. Flowers*, 8 Leigh, 158; *Shanke v. Lancaster*, 5 Grat. 119; *Stinchcomb v. March*, 15 Grat. 202; *Rauch v. Oil Co.*, 8 W. Va. 36; 1 Am. Led. Cases, note to *Elwell v. Shaw* (596). But it is now enacted in Virginia (Code 1849, ch. 116, § 3; Code 1887, § 2416): "If in a deed made by one as attorney in fact for another, the words of conveyance or the signature be in the name of the attorney, it shall be as much the principal's deed as if the words of conveyance or the signature were in the name of the principal by the attorney, if it be manifest on the face of the deed that it should be construed to be that of the principal to give effect to its intent."

§ 123. **Deed by Grantor Out of Possession with an Adverse Possession Against Him.**—At common law such deed was void;

but it is now valid in Virginia. See Code § 2418, enacting that: "Any interest in or claim to real estate may be disposed of by deed or will." *Carrington v. Goddin*, 13 Grat. 587; *Mustard v. Wohlford*, 15 Grat. 339. And see C. V., § 2439; *Harman v. Stearns* (Va.), 27 S. E. 601.

II. Warranty, or the Ancient Covenant Real.

§ 124. **Definition of Warranty.**—"A warranty," says Lord Coke, "is a covenant real annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same; and either upon a voucher or judgment in a writ of *warrantia chartæ*, to yield other lands and tenements to the value of those that may be evicted by a former [*i. e.*, paramount] title, or else may be used by way of rebutter." 2 Tho. Coke (245). Warranty applies only to *freehold* interests in lands and tenements, and can be created by no word whatsoever except *warrantizo* in Latin, or *warrant* in English. If any other word or phrase be substituted or be joined with the word "warrant" (except the auxiliary *will* or *shall*) it is not the ancient covenant *real*, or *warranty*, but it becomes a modern *personal* covenant, and the remedy for its breach is a *personal* action for *damages* (money), and not a *real* action for *other land* of equal value, as in the case of a true warranty.

§ 125. **The Two Kinds of Warranty.**—The ancient feudal warranty may be either *lineal* or *collateral*. See 2 Bl. Com. ch. 20, p. (301), *et seq.* Lineal warranty is where the heir on whom the warranty descends would have inherited the land warranted (had it not been sold) from the *same ancestor* from whom the warranty descends. *Collateral* warranty is where the heir on whom the warranty descends could not, even by possibility, have inherited the land warranted from the same ancestor from whom the warranty descends. Hence in this case, the warranty is aside from, or not connected with, the descent of the land, and hence is called collateral.

§ 126. **Examples of Lineal and Collateral Warranty.**—(1). *Lineal*. Suppose a father conveys his land in fee-sim-

ple, with warranty binding himself and his heirs, and then dies. Here the *warranty* descends upon the eldest son (heir at law), and the *land* would have descended to him from his father who gave the warranty, if the land had not been sold, and hence the warranty is called *lineal*. So if a man's next heir is a nephew, and he conveys his land with warranty binding his heirs, this is also lineal warranty. For though the *descent* to the nephew is collateral, yet the *warranty* is lineal, for it descends from the owner of the land on his heir, who would have been heir to the land had it not been sold.

(2). *Collateral*. Three cases may be considered: (a) Conveyance in fee by a tenant by the curtesy. Let B and F be husband and wife, and let the wife own land in fee-simple. S, son of B and F, is heir both to his father and mother. Now, if F dies, and B is tenant by the curtesy of her land, and so entitled to a life estate only therein, if B conveys F's land in fee-simple, with warranty binding his heirs, this warranty is collateral as to the son, because the warranty descends upon him from his father, while the land descends from his mother, he being the common heir of both parents.

(b). Conveyance in fee by a tenant in dower. Let B and F be man and wife, and let the land belong to B, who dies leaving F, his widow, and S, his son and heir. Now, if one-third of B's land is assigned F for her life as her dower, and she conveys it to C in fee-simple, with warranty binding herself and her heirs, this warranty is collateral, for the warranty descends upon the son from his *mother*, whereas the title to his land was derived as heir to his *father*.

(c). Conveyance in fee by a tenant for life, whose own son is remainderman in fee-simple. Suppose the lord enfeoffs B for life, remainder to S and his heirs, and that S is the son of B. Now, if B conveys the land to C and his heirs, with warranty binding himself and his heirs, the warranty is collateral, for S's title to the *land* is received as a *purchaser* under feoffment made by the lord, whereas the *warranty* descends upon him from his *father*, whose heir he unfortunately happens to be.

§ 127. **Effect of the Ancient Warranty.**—(1). Where the warranty was *lineal*. The heir of course (at least after the right of alienation was given by *Quia Emptores*, 1290) could not claim the land by *descent* from the ancestor who had sold it and conveyed it away. Hence warranty was not needed to *rebut* the claim of the heir to the ancestor's land. But the effect was that if it turned out that the land did not really belong to the ancestor, and the purchaser, with warranty binding the heir, was evicted by the title paramount of a third person, the true owner, the heir, if other lands had descended to him from the warranting ancestor, was *bound to compensation*; *i. e.*, he was bound to make good the ancestor's warranty to the purchaser, by rendering him *other lands* of equal value with that lost by the purchaser. But no heir at common law was thus bound to compensation: (a) unless he was *named* in the warranty, and (b) unless he had assets (*assez enough*) by descent from the warranting ancestor *sufficient* for compensation.

(2). When the warranty was *collateral*. The effect was to *rebut* or *repel* the heir from claiming, under his own *title paramount*, the land conveyed away by the ancestor. And at common law the claim of the heir was rebutted, although he received no assets by descent from the warranting ancestor. Thus in the three cases of collateral warranty put in § 126, *supra*, the ancestor's deed with warranty operated to *rob the heir* of his land derived from others than the warranting ancestor.

§ 128. **Explanation of the Apparent Injustice of Collateral Warranty.**—Judge Tucker suggests that as the conveyances made in § 126, *supra*, were *tortious* (*i. e.*, a feoffment conveying a larger estate than the feoffor had) and a ground of forfeiture, the heir might have made entry upon the purchaser in his ancestor's (father's) lifetime, and thus have avoided his ancestor's deed, and the warranty therein at the same time. Hence the law presumed, as the heir did not enter, but allowed the warranty to descend upon himself, that he had

received from his ancestor some *equivalent* for the land conveyed with warranty, and therefore held the warranty binding upon the heir, as having been agreed to by him. 2 Tuck. Com. (238); 3 Lom. Dig. R. P. 246.

§ 129. **Status now of the Ancient Feudal Warranty.**—In England it is abolished, along with *real* actions, by 3 and 4 Will. IV. (1833). Only the *personal* covenants for title are now in use in England. But in Virginia the ancient warranty is not abolished, but is reduced to reason by the following enactment (C. V., § 2419): “When the deed of the alienor *mentions* that he and his heirs will warrant what it purports to pass or assure, if anything descends from him his heirs shall be *barred* for the value of what is so descended, or *liable* for such value.” The word “*barred*” above, has reference to collateral warranty, where the land really belongs to the heir, but he is compelled by the warranty to let it go to the purchaser to the extent that he (the heir) has assets by descent. At common law the heir was barred, even though he received no assets. The word “*liable*” above has reference to a case where the purchaser is evicted by the title paramount of a *third person*, when the heir, out of assets descended, is compelled to render compensation to such purchaser. And even at common law no heir was bound to *make compensation* except out of and to the extent of assets descended. And under the ancient warranty, in making compensation, the land warranted was valued as at the date of the *warranty*, and not at the date of the *eviction* of the purchaser. See *Threlkeld v. Fitzhugh*, 2 Leigh (451).

III. *The Modern Covenants of Title.*

§ 130. **Implied Covenants.**

(1). In a lease *for years*, a covenant for quiet possession is implied from the word “*demise*,” or any other word of leasing. 53 Am. St. R., 113–120; *Stott v. Rutherford*, 92 U. S., 107.

(2). In a lease *for life*, the use of the word “*give*,” or the

reservation of rent, implies the ancient feudal warranty, but not a modern covenant for title. *Black v. Gilmore*, 9 Leigh 446; Rawle on Covenants for Title, 459. For the warranty implied on exchange and partition, see Rawle, Cov. for Title, 457, 473-'78; Freeman, Cotenancy and Partition, § 533; 2 Bl. Com. (323).

(3). But when there is a conveyance of the vendor's whole estate in fee-simple, leaving in him no reversion, there is, in the absence of statute, *no implied warranty*, and *no implied covenants for title*; and if there is no *express* warranty or covenants, the purchaser who is evicted by title paramount of a third person has no recourse against the seller, but must bear the loss himself.¹ But this application of the maxim

¹ NO IMPLIED WARRANTY OF TITLE.—The rule is thus laid down by Sugden (1 Sug. V. & P. 251): "Generally speaking, a purchaser after a conveyance has no remedy except upon the covenants he has obtained, although evicted for want of title; and however fatal the defect of the title may be, if there is no fraudulent concealment on the part of the seller, the purchaser's only remedy is under the covenants." And again (2 Sug. V. & P. 249): "If the conveyance has been actually executed by all the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase-money either at law or in equity." And Kent says (2 Kent's Com. 473): "I apprehend that in sales of land, the technical rule remits the party back to the covenants in his deed; and if there be no ingredient of fraud in the case, and the party has not had the precaution to secure himself by covenants, he has no remedy for his money, even on failure of the title." And see Maupin, Marketable Title to Real Estate, p. 143, where it is said: "As a general rule, the purchaser's right to relief against the vendor, in case he should suffer loss through a defective title, after the contract has been executed by a conveyance, depends upon the covenants which that conveyance contains. If there are no covenants, the almost universal rule is, that the purchaser is, in the absence of fraud or mistake, absolutely without relief at law or in equity." See, also, to same effect, 2 Min. Ins. (4th ed.) 717; Tiedeman, Real Prop. § 849. But see Tiedeman, Real Prop. § 859, where it is said: "In a number of the States, notably Alabama, Arkansas, California, Delaware, Illinois, Iowa, Mississippi, Missouri and

caveat emptor only takes effect when these three things occur: (1) When the conveyance is in fee; (2) When the buyer has *accepted a deed of conveyance* without warranty or covenants; and (3) When the seller is guilty of no fraud or deception, and is as ignorant of the defect in the title as the buyer is. If these three things concur, then, says Judge Tucker, "the general principle is now well understood that the vendee (buyer) who does not take proper covenants for his security must lie down under the consequences of his own negligence, or want of forecast." *Black v. Gilmore*, 9 Leigh 446; Devlin on Deeds, § 947. Hence the importance it contains of a purchaser's refusing to accept a deed unless express covenants of title.¹

Pennsylvania, statutes have been enacted whereby the operative words, 'grant, bargain, and sell,' imply general covenants of seisin, against encumbrances, and of warranty or quiet enjoyment." And see as to the statutory effect of the words "grant, bargain and sell," Maupin, § 137.

¹ FRAUD AND MISTAKE.—If the vendor has been guilty of fraud, as if he has made misrepresentations concerning the title, or has concealed facts from which a defect of title arises, the vendee may have a rescission of the contract in equity, or he may sue at law for the deceit. And in the case of fraud, whether there be covenants for title in the deed or not, the vendee may sue at once without waiting for an eviction. But a vendee not evicted, but remaining in undisturbed possession, must rely on his covenants, if any, except in a case of fraud. These rules are laid down in *Patton v. Taylor*, 7 How., 159: "A purchaser in the possession of land will not be relieved against the payment of the purchase money on the mere ground of defect of title, there being no fraud or misrepresentation; in such a case he must seek his remedy at law on the covenants in his deed. If there is no fraud and no covenants to secure the title, he is without remedy; as the vendor, selling in good faith, is not responsible for the goodness of the title beyond the extend of his covenants in the deed. Relief will not be granted on the ground of fraud unless it be made a distinct allegation in the bill so that it may be put in issue by the pleadings." See, in accord, *Noonan v. Lee*, *supra*; *Peters v. Bowman*, 98 U. S., 56; *Feemster v. May*, 13 Sm. & M., 275; *Wiley v. Fitzpatrick*, 3 J. J. Marsh. 584; *Elliott v. Thompson*, 4 Humph., 99;

§ 131. **Express Covenants for Title.**—For the five covenants in use in England, see Wms. R. P. (447); 2 Devlin on Deeds, §§ 881–957. The Virginia Code omits the first (“that the vendor is seised in fee-simple”) and substitutes for the others short forms, which it declares shall have the same effect as the verbose and tedious forms once in use. The four short forms are: (1) “That he has the right to convey the said land to the grantee;” (2) “That the grantee shall have *quiet possession* of the said land”; (3) “That he will execute such *further assurance* of the said lands as may be required;” and (4) “That he has done no act to *encumber* the said land.” The second covenant above (for

Tunc v. Rector, 21 Ark., 283; *Gifford v. Benefit Society*, 104 N. Y. 139; *Wood v. Amory*, 105 N. Y., 278. For the rule in Virginia and West Virginia as to in junction in favor of purchaser against the collection of the purchase money, see *Beale v. Seiveley*, 8 Leigh, 658, 675; *Walmsley v. Stalnaker*, 24 W. Va., 214 Maupin, § 337 and notes.

Whether a *mistake* as to the title, in the absence of fraud, will authorize rescission when the purchaser gets the identical land bought, but loses it by failure of title, may well be doubted, though cases might occur of such extreme hardship as to lead the courts to make an exception. In *Sutton v. Sutton*, 7 Grat., 238, Judge Baldwin says: “The property sold was the identical property conveyed by the deed; and there was no room for any mistake unless in regard to the validity of the grantor’s title. A mistake in respect to that matter is no ground of relief to a purchaser when he takes upon himself the risk as to the title, as he does when he purchases land without agreement, express or implied, for a conveyance with warranty of title.” And see Adam’s Eq. (190). On the other hand, it is said in *Thompson v. Jackson*, 3 Rand., 507, that if a mistake be “plain and palpable, and affect the very substance of the subject-matter of the contract,” there may be rescission, though there is no warranty and no *mala fides*. The cases cited are *Turner v. Turner*, 2 Ch. R., 81; *Bingham v. Bingham*, 1 Ves. Sr., 126; *Armstrong v. Hickman*, 6 Munf., 287; *Tucker v. Cocke*, 2 Rand., 51. But *quære* whether something more is not required to constitute a mistake as to the “substance of the subject-matter” than mere failure of title to land?

But granting that a mistake as to the validity of the title is

quiet possession) is equivalent to what is called a "covenant of *general warranty*," of which the Code declares (§ 2446): "A covenant by the grantor in a deed 'that he will warrant generally that the land thereby conveyed' shall have the same effect as if the grantor had covenanted that he, his heirs, and personal representatives, will forever war-

irremediable, there are certainly mistakes as to which relief will be granted, though there is no charge of fraud. Such cases are where the land conveyed is not the land bargained for; or where the money is paid for the purchase of land which has no existence; or when the title fails for want of authority in the person who makes the deed to act in the capacity in which he purports to act. *Mundy v. Vawter*, 3 Grat., 494; *Martin v. McCormick*, 8 N. Y., 331; *Kyle v. Kavanaugh*, 103 Mass., 356.

In Maupin's Marketable Title, 618, the rule is thus laid down: "If the contract has been executed by a conveyance of the land to the purchaser, without general covenants for title, he can, if the title fails, neither recover back the purchase money nor detain that which remains unpaid, either at law or in equity, unless the vendor was guilty of fraud, or the contract was founded in mistake of the parties as to some fact upon which the title depended." And on page 803, he thus explains this class of mistakes: "Of the former class are cases in which the purchase is of an interest or estate liable to be divested upon the happening of a particular event, and that event has already transpired without the knowledge of the parties, as where the purchaser of an estate *pur autre vie* takes a conveyance in ignorance of the fact that the person on whose life the estate depends is already dead. Of the same class is a case in which, at the time of the sale, the parties were ignorant that the land had previously been sold and conveyed by one acting under a power of attorney from the vendor. In all such cases the subject-matter of the contract has no existence; there is no mistake or title *de facto* or *de jure* in the grantor; and the grantee is as much entitled to rescission as the buyer of a chattel which, at the time of the sale, had been destroyed without the knowledge of either party. But care must be taken to distinguish between mistake as to the existence of an estate of any kind in the grantor, *de facto* or *de jure*, and mere ignorance of the existence of a paramount title to the estate in a stranger, *e. g.*, mere ignorance of the fact that a deed in the grantor's chain of title is, for any reason, inoperative to pass the title. In such a case, the ignorance of the

rant and defend the said property unto the grantee, his heirs, personal representatives and assigns, against the claims and demands of all persons whomsoever." And the covenant of *special warranty* is the same, except that the grantor warrants and defends not against *all persons whomsoever*, but only "against those claiming, or to claim *by, through, or under him.*" And the Code further provides that the words "with general warranty" in the granting part of any deed shall be deemed to be a *covenant* of general warranty, and that the words "with special warranty" in the granting part of any deed shall be deemed to be a *covenant* of special warranty. See on the whole subject, Code Va. ch. 108.¹

defect is no ground for rescinding the contract, for one of the chief purposes of taking a conveyance with the general warranty is to provide against defects of title of which the parties are ignorant. The words, "mistake of fact," used in this connection, would seem to imply some particular fact or facts to which the attention of the parties was specially drawn, and which must be supposed to have been necessarily contemplated by them at the time the conveyance was made. If this were not true, any conveyance would be liable to rescission on the ground of mistake, if, after it had been executed, the title should be first discovered to be bad." And he adds: "If a man purchase his own estate in ignorance of facts which would show his right, he will be relieved in equity. Thus, if an heir were to take a conveyance of his own inheritance, ignorant of the fact that he was heir, there is no doubt that equity would rescind the contract;" citing *Bingham v. Bingham*, 1 Ves. Sr., 126; *Cooper v. Phibbs*, L. R., 2 H. L., 170.

¹COVENANTS FOR TITLE.—For discussion of the covenant of seisin ("that he, the said (grantor), is lawfully seised of the said premises"), see Maupin, §§ 108-119; 99 Am. Dec. 73-81), note. As to covenants of general and special warranty, see Maupin, §§ 134-177. In § 135 it is said: "In a number of States the covenant of warranty includes, by virtue of statutory provision, or judicial construction, all the other covenants for title. But in most of the States it is regarded only as a covenant against eviction by one claiming under a superior title." Thus in *Marbury v. Thornton*, 82 Va. 702, it is held that a covenant of warranty can never be treated as a covenant against encumbrances,

§ 132. **Covenants to which the Purchaser of Land is Entitled.**—In Virginia, if the seller conveys in his own right, as owner, the purchaser can demand a clear title with covenant of *general warranty*. See for full discussion, Maupin, §§ 67-70: "Covenants which the purchaser has a right to demand."

since it would then be broken as soon as made, and would not run with the land. See, also, *Bank v. Thornton*, 83 Va. 157. But in one sense a covenant of warranty includes a covenant against encumbrances; for an eviction by the enforcement of an encumbrance is as much a breach of the covenant of warranty as if the eviction had been by one claiming under a superior title. Maupin, p. 324. And on p. 305, he says: "The rule that a covenant against encumbrances does not run with the land, is comparatively unimportant when the deed contains also a covenant of warranty which, of course, must always be the case in those jurisdictions in which, by statute or judicial construction, a covenant of warranty includes a covenant against encumbrances. The covenantee may wait until he is actually evicted by the enforcement of the encumbrance, or he may suffer a constructive eviction by discharging the encumbrance in order to prevent an actual dispossession, and in either case recover for the breach of the warranty, regardless of the covenant against encumbrances. No damage, as a general rule, flows from the breach of the covenant until the encumbrance has been actually or constructively enforced, and when that occurs the covenant of *warranty* is broken, and an action for damages immediately accrues in favor of the person then owning the premises."

The covenant of warranty is generally considered the principal covenant in conveyances, and when this is *special*, and is followed in the same sentence by other covenants in more general language, the subsequent covenants will be restricted by the special covenant of warranty, unless a different intention is manifest. Thus in *Allemong v. Gray*, 92 Va. 216, the covenants were that the grantors "will warrant specially the land hereby conveyed; that they have the right to convey the said land to the said grantees; that the said grantees shall have quiet possession thereof, free from all encumbrances; that they will execute such further assurance of the said land as may be requisite, and that they have done no act to encumber the same"; and all the covenants were held to be special, following the lead of the special warranty.

As to what amounts to a breach of a covenant against en-

In Virginia, if the contract of sale is silent as to covenants, the vendor cannot be required to insert in the deed any other covenant than that of general warranty. *Dickinson v. Hoomes*, 8 Grat., 353; *Kenny v. Hoffman*, 31 Grat., 442. But those who do not convey in their own right, as executors selling under the provisions of a will, commissioners, guardians, etc., are required to give a *special warranty* only. And in England, no grantor (except a mortgagor) gives general war-

cumbrances, see Tiedman Real Prop. § 853, where the following instances are given: "An inchoate right of dower; a judgment lien; an outstanding mortgage; taxes when ascertained and determined; an outstanding lease in possession; conditions and covenants restricting the use of premises. And it may be mentioned that pre-existing easements upon the land will constitute breaches of the covenant against encumbrances." As to an inchoate right of dower, see *Southern, etc., Ins. Co. v. Kloeber*, 31 Grat. 739; *Ficklin v. Rixey*, 89 Va. 832. As to a public highway through the land, if known to the purchaser, it is presumed to be taken into consideration when the purchase is made, and is not a breach of a covenant against encumbrances, but it is otherwise when the existence of the highway was unknown, when the purchase was made. *Jordan v. Eve*, 31 Grat. 1; *Trice v. Kayton*, 84 Va. 217. For full discussion of encumbrances, see 2 Devlin on Deeds, §§ 905-920; Maupin, §§ 119-123. When the deed contains no covenants, it is said by Maupin (p. 620): "The rule that a purchaser who has taken no covenants for title can have no relief if evicted from the premises by one having a better right, is satisfactory in all cases in which it appears that the purchaser intended to accept the risk of a defective title, provided that rule be limited to cases where the estate is lost through a defect in the title proper; that is, through the assertion of an outstanding paramount title in a stranger. But it is not easy to perceive any sound reason why a purchaser who pays off a prior encumbrance on the land, or who redeems from a purchaser under such encumbrance, should not be *subrogated* to the rights of the encumbrancer, without regard to the existence or non-existence of covenants for title in the conveyance under which he holds. The doctrine of subrogation is a creature of equity, and is in no wise dependent on any contract or covenant between the parties. . . . Inasmuch then as any person buying the encumbrance, or paying it off, other than a mere volunteer, would

ranty. See *Wms. R. P.* (448); *Rawle on Cov. for Title* 36; 53 *Am. Rep.* 749. For *contract* to convey with general warranty, see *Adkins v. Edwards*, 83 Va., 300. See also *Gish v. Moomaw*, 89 Va., 376.¹

§ 133. Importance to the Buyer of Other Covenants than that of General Warranty.—Because general warranty is only broken by *eviction*, whereas covenants of good right to convey

be accorded that right [of subrogation], justice would seem to require that a purchaser paying off the encumbrance to protect his estate should be treated as an equitable assignee of the rights, powers and privileges of the encumbrancer, though he took a conveyance without covenants for title; unless, indeed, it should appear that the existence of the encumbrance was known to him, and influenced the consideration of the conveyance."

¹ **QUIT-CLAIM DEED.**—In *Moelle v. Sherwood*, 148 U. S., 21, 29, it is said: "In many parts of the country a quit-claim or simple conveyance of the grantor's interest is the common form in which the transfer of real estate is made. A deed in that form is, in such cases, as effectual to divest and transfer a complete title as any other form of conveyance. There is in this country no difference in their efficacy and operative force between conveyances in the form of release and quit-claim and those in the form of grant, bargain and sale. If the grantor, in either case, at the time of the execution of his deed, possesses any claim to, or interest in, the property, it passes to the grantee. In the one case, that of bargain and sale, he impliedly asserts the possession of a claim to, or interest in, the property, for it is the property itself which he sells and undertakes to convey. In the other, that of quit-claim, the grantor affirms nothing as to the ownership, and undertakes only a release of any claim to, or interest in, the premises which he may possess, without asserting the ownership of either." And see 1 *Devlin on Deeds*, § 27; *Maupin*, § 11.

As to the effect of a quit-claim deed with a covenant of general warranty, see *Hull v. Hull*, 35 W. Va., 155, 164, where it is said: "When a deed conveys the grantor's right, title and interest, though it contains in general terms a covenant of general warranty, the covenant is regarded as a restricted one, limited to the estate conveyed, and not one defending generally the land described. The covenant of warranty is intended to defend only

as against encumbrances are broken, if at all, *as soon as they are made*, and the buyer can sue at once, without waiting to be evicted. *Sheffey v. Gardiner*, 79 Va. 313; *Meek v. Spracher*, 87 Va. 162; *Jones v. Richmond*, 88 Va. 231. But in *Sheffey v. Gardiner*, *supra*, it is held that it is a constructive eviction when the premises, at the date of conveyance, are in actual possession of a third person, claiming under paramount title. See Maupin, § 146.

what is conveyed, and cannot enlarge the estate conveyed. Here the grantors conveyed only their own interest." That a purchaser under a quit-claim deed takes subject to a prior deed by the vendor to another, though such prior deed is unrecorded, see *Virginia, etc., Iron Co. v. Fields* (Va.), 26 S. E., 426. As to whether the grantee under a quit-claim deed is a purchaser for value without notice, see Devlin on Deeds, §§ 670-676. In *Moelle v. Sherwood*, 148 U. S., 21, it is held that the receipt of a quit-claim deed does not, of itself, prevent a party from becoming a *bona fide* holder; and that the doctrine expressed in many cases, that the grantee in such a deed cannot be treated as a *bona fide* purchaser, does not rest on any sound principle.

When one grants land with general warranty, of which he, at the time, has not the title, if he afterwards acquires the title, it enures to the grantee. The grantor is estopped by the warranty from denying that he had the title at the date of his deed. *Doswell v. Buchanan*, 3 Leigh, 365; *Burtners v. Keran*, 24 Grat., 42, 66; *Raincs v. Walker*, 77 Va., 92; *Gregory v. Peoples*, 83 Va., 355; *Nye v. Lovitt*, 92 Va., 710; *Ryan v. United States*, 136 U. S., 68, 88. But if the deed purports to convey only "all the right, title and interest" of the grantor in the premises described, *i. e.*, is a *quit-claim* deed, a covenant of general warranty is confined to the right, title, or interest conveyed, and does not estop him from asserting a subsequently acquired title in the premises. *Hanrick v. Patrick*, 119 U. S., 156. And while the general rule is that where land is conveyed without warranty, the grantor is not estopped from setting up an after-acquired title, yet "where the deed recites or affirms, expressly or impliedly, that the grantor is seised of a particular estate which the deed purports to convey, and upon the faith of which the bargain was made, he will be thereafter estopped to deny that such an estate was passed to his vendee, although the deed contains no covenant of warranty at all." *Reynolds v. Cook*, 83 Va., 817, 821, per Lewis, P., citing *Van Rensselaer v. Kearney*, 11 How. (U. S.), 297.

§ 134. **Covenants for Title Running with the Land.**—A covenant runs with the land when it passes to a purchaser from the first purchaser, so that the second purchaser can sue the original vendor (covenantor). The doctrine is that no covenant after breach is assignable. Hence no covenant which is broken, if at all, as soon as made, can run with the land. Hence covenants of seisin, good right to convey, and against encumbrances, do not run with the land, and are not available except to the original purchaser. But covenants for quiet enjoyment, of warranty, general and special, and for further assurance, are *future* in their operation, and are not broken as soon as made, and so do run with the land, and are available to any purchaser in the series, second, third, or fourth, who may have occasion to resort to it. See 2 Devlin on Deeds, §§ 940-42; *Dickinson v. Hoomes*, 8 Grat. 353, 395; *Marbury v. Thornton*, 82 Va. 702; *Lydick v. R. Co.*, 17 W. Va. 427; 47 Am. Dec. 569-577, note.¹

¹ COVENANTS RUNNING WITH THE LAND.—In England all of the five covenants for title run with the land. See Rawle, Covenants for Title, ch. 10. Also 53 Am. Dec. 570, where it is said: "In America, however, the rule is different. Though some of the States follow the English doctrine [see as to this, Maupin, §§ 112, 128], the general rule of decision has drawn a distinction between the covenants of seisin, of right to convey, and against encumbrances, and those of warranty and quiet enjoyment, holding that the former are personal, and do not run with the land, while the latter run with the land, and are binding on subsequent assignees." The two reasons why a covenant of seisin does not run with the land are thus stated by Maupin (§ 111): "(1) That the covenant in question is broken as soon as made, if the covenantor has no title, and that a present right of action immediately accrues thereupon to the covenantee, which being a mere *chose in action*, is both at common law, and by virtue of the statute of 32 Hen. VIII., c. 24, incapable of assignment; and (2) That the grantor and covenantor having no title, no estate could pass by his conveyance to the covenantee, and that consequently there was nothing with which the covenant could run so as to enure to the benefit of a remote grantee." The first of these reasons is equally applicable to a covenant against encum-

§ 135. **Measure of Damages.**—When a covenant of general warranty is broken by eviction of the grantee by a third person with a paramount title, the grantee recovers the *consideration paid by him*, with the interest from date of eviction, the consideration paid being conclusively presumed to be the value of the land at the time of conveyance and warranty. He cannot recover the value of the land at the time of his *eviction*, if it has risen in value; and, on the other hand, he is entitled to recover the price paid, though the land has fallen in value. See *Stout v. Jackson*, 2 Rand., 132;

branches. Maupin, § 128. But when covenants run with the land, the benefit of the covenant enures to the remote purchaser by operation of law, not as an assignee of the covenant, but as owner of the land to which it is attached, and by reason of privity of estate. It follows that the assignee can sue the remote vendor thereon at law, and in his own name. It has been suggested that covenants which do not run with the land may be available to a subsequent purchaser in equity, or by an action at law in the name of the original covenantee. Maupin, §§ 112, 154. And see 2 Min. Ins. (4th ed.), p. 717, where it is said: "It must be noted that no covenant which is *broken* is capable of being afterwards assigned *at law*." And in Rawle on Covenants for Title, it is said: "As the obstacle which prevents an assignee from suing on these covenants is merely technical, it may be presumed that if the American courts deem themselves restrained by authority from getting over it and adopting the English rule, they will at least be prepared to sustain a suit in the name of the original covenantee for the benefit of those claiming under him by purchase. This must be the case if the assignee of the land be held to be an equitable assignee of the covenant; and as such must certainly be his position when the covenant is expressly assigned at the time of the conveyance, it would seem that the mere conveyance of the land may be thought to imply a transfer of the covenant, on the general rule that the assignment of the principal draws with it the accessory." But *quare* whether there is not a material distinction in this case between an express and implied assignment; and whether an assignment should be implied when its effect would be, by a mere change in the form of action, to make all covenants run with the land.

Threlkeld v. Fitzhugh, 2 Leigh (451); *Click v. Green*, 77 Va., 827; *Sheffey v. Gardiner*, 79 Va., 313; *Conrad v. Effinger*, 87 Va., 59; *Roller v. Effinger*, 88 Va., 641; *Butcher v. Peterson*, 26 W. Va., 447; *Brooks v. Black* (Miss.), 24 Am. St. R., 254, and note, 266-268.¹

¹ MEASURE OF DAMAGES FOR BREACH OF WARRANTY.—All the late Virginia cases cited above affirm the rule laid down in *Threlkeld v. Fitzhugh*, 2 Leigh, 451, which is thus more fully stated in the head-note: "The proper measure of damages is the purchase money, with interest from the date of the actual eviction, the costs incurred in defending the title, and such damages [*i. e.*, for mesne profits] as the vendee may have paid, or may be shown to be clearly liable to pay, to the person who evicted him [*i. e.*, by title paramount]. And see 24 Am. St. R., 266, where the rule is, in substance, thus stated, and is said to prevail in all the States except Connecticut, Maine, Massachusetts and Vermont, in which it is held that the correct measure of damages for a total breach of warranty of title is *the value of the land at the date of eviction*, with interest and the costs and expenses of the suit in which the injured party has been evicted. For the measure of damages for breach of covenant of seisin or good right to convey (same as for breach of warranty), see 99 Am. Dec., 73-81, note. Of course, in case of *partial* eviction, the damages are apportioned. 24 Am. St. R. 267.

But while the rule is that the vendee recovers the price paid by him, as above stated, neither vendor nor vendee is concluded by the consideration recited in the deed of conveyance, and it may be shown, by extrinsic evidence, what was the real consideration, whether more or less than that recited. *Summers v. Darne*, 31 Grat., 804; *Click v. Green*, 77 Va., 827. And it is well settled that the vendee may purchase the paramount title by which he could have been evicted, and in such case he may recover as damages the sum he paid therefor, provided it does not exceed the price paid the vendor. See Maupin, § 168; 24 Am. St. R., 267. But though the vendee succeeds in buying in the paramount title at much less than the price paid for the land by him to the vendor, he can only recover of the vendor the amount expended; for he stands towards the vendor in a fiduciary relation, and can claim no more than his actual expenditure in perfecting the title. *Roller v. Effinger*, 88 Va., 641. As to the effect of bringing in the warrantor to defend the title when the buyer is sued

by one claiming under an alleged title paramount, see 43 Am. Dec., 569-573, note.

As the covenant of warranty runs with the land it is, of course, available to the last vendee during whose possession the eviction occurs; indeed, the right of action is in him, and he only can sue the remote vendor (original covenantor) in the first instance. But when his immediate vendor also conveyed with warranty, the last vendee has his election to sue either his immediate vendor or the first vendor; or he may sue them both, and recover judgment against each; but, of course, there can be but one satisfaction. And if the last vendee recovers of his immediate vendor, then such vendor can sue the original vendor on his warranty. See Tiedeman, § 860; Maupin, § 159.

But it may happen that the price paid by the last vendor was more or less than that received by the original grantor. In such case, if the last vendee sue the original grantor, what shall be the measure of damages—the price the last vendee has paid, and which he could recover of his own grantor, or the consideration received by the first grantor? On this question the cases are in conflict. For full discussion, see *Brooks v. Black*, 68 Miss., 161 (24 Am. St. R., 259). In the note to that case (p. 268) it is said that in Maryland, Minnesota, North Carolina and Tennessee it is held that the last vendee can only recover what he has paid to his own vendor with interest and with costs. And this rule is approved by Maupin (Marketable Title, § 166) where the consideration paid for the land by the last vendee is less than that received by the first vendor; but he adds: "If he paid more than the original purchase money he cannot recover the excess on the original covenantor's warranty. The measure of damages for which the covenantor is liable cannot be increased by a transfer of the land." On the other hand, in Iowa, Kentucky, Mississippi and South Carolina it is held that the last vendee can recover the full amount of the consideration received by the remote vendor, with interest and costs, without regard to the amount he himself has paid. And this rule is ably vindicated in *Brooks v. Black*, *supra*. See *Conrad v. Effinger*, 87 Va., 59.

CHAPTER VIII.

TITLE BY ADVERSE POSSESSION.

§ 136. **Introductory.**—Title by adverse possession rests upon the statutes limiting the time within which the owner must sue for the recovery of his land in the adverse possession of another. By such adverse possession for the statutory period, the title of the lawful owner is lost to him by his neglect to sue, and vests in him who is in possession, who thus acquires a title by prescription. See *Campbell v. Holt*, 115 U. S. 620, 623; *Probst v. Presbyterian Church*, 129 U. S. 182; *Sharon v. Tucker*, 144 U. S. 533; *Jones v. Thomas*, 28 Grat. 383; *Carnel v. Lynch*, 91 Va. 114; *Hall v. Hall*, 27 W. Va. 468, 480; *Langdell*, Summ'y Eq. Pl., §§ 121-'22.

§ 137. **The Virginia Statute of Limitations as to Land.**—Code of Va., § 2915, enacts: "No person shall make an entry on or bring an action to recover, any land lying east of the Allegheny mountains but within fifteen years, or any land lying west of the Allegheny mountains but within ten years, next after the time at which the right to make such entry or bring such action shall have first accrued to himself, or to some person through whom he claims. For the purposes of this section, the county of Carroll shall be held and considered as lying wholly west of the Allegheny mountains." In West Virginia, entry or action must be made within ten years; Code W. Va, ch. 104, § 1. In Texas within ten years; *Horn v. Smith*, 79 Tex. 310 (23 Am. St. Rep. 340). The period varies from ten to twenty-one years in the different states. When several persons enter upon land in succession, the several adverse possessions can be *tacked* so as to make up

the statutory period to bar the owner, provided that between such person there is privity of title or claim. *Hollingsworth v. Sherman*, 81 Va. 668; *Jarrett v. Stevens*, 36 W. Va. 445. That there can be no adverse possession against the State, see *Reusens v. Lawson*, 91 Va. 226; *Buntin v. City of Danville*, 93 Va. 200.

§ 138. **Effect of the Statutes.**—It must be remembered that no owner of land can be barred of his title unless he has been *put to his entry or action* for the statutory period, and this cannot be unless the owner is *out of possession* of his land with a claimant in the possession of it, holding it *adversely* to the owner. *Such claimant must be in adverse possession.*

§ 139. **What is Adverse Possession of Land?**—In order to be *adverse*, the defendant's possession must be (1) actual; (2) open and notorious; (3) exclusive; (4) in defiance of and hostile to the true owner (the plaintiff); (5) and with *claim of title* in himself. *Taylor v. Burnside*, 1 Grat. (165) (190); *Andrews v. Roseland, etc., Co.*, 89 Va. 393; *Core v. Faupel*, 24 W. Va. 238; *Sharon v. Tucker*, 144 U. S. 533; 1 Am. & Eng. Ency. Law (2nd ed.) 789. And to bar the owner, such adverse possession must continue *without interruption* for the statutory period. Let us examine these requisites in their order.¹

¹ REQUISITES FOR ADVERSE POSSESSION.—In *Swann v. Young*, 36 W. Va., 57, 72, it is said of adverse possession: "It must be 'continuous' and 'uninterrupted' for the period (ten years by our law) prescribed by the statute; 'continuous' in the sense of not being abandoned by himself; 'uninterrupted' in the sense of not being effectively broken by another." In addition to the requisites stated in the text, it is sometimes said that a possession to be adverse must be "honest," or "*bona fide*." See on this point 1 Am. & Eng. Ency. Law (2nd ed.), p. 868, n. 3, where it is said: "The requirement of good faith in an adverse claimant is generally held to be material only when a person is claiming constructive possession under color of title; and does not apply when there is a disseisin of the true owner, and an actual, open

(1). *Actual*. The true owner cannot be barred unless the claimant takes actual possession of the land. For what constitutes actual possession, see opinion of Baldwin, J. in *Taylor v. Burnside*, 1 Grat. 166, 192. See also *Turpin v. Saunders*, 32 Grat. 27; *Lennig v. White* (Va.) 20 S. E. 831; *Swann v. Young*, 36 W. Va. 57; *Parkersburg, etc., Co. v. Schultz* (W. Va.), 27 S. E. 255; *Ward v. Cochran*, 150 U. S. 597; *Willamette, etc., Co. v. Hendrix* (Oreg.) 52 Am. St. R. 800. As to what is necessary to constitute actual possession

and adverse possession, which exposes the claimant [occupant] to an action by the true owner." And this distinction is believed to be sound. The true owner is equally disseised, and "put to his entry or action" by the actual adverse possession of the hostile claimant, whether such possessor's claim be in good or bad faith. In 11 Harvard Law Review, 553, it is said: "The essence of adverse possession is that the holder occupies not under, but in opposition to, the right of the true owner. By the better opinion, color of title is not necessary, nor even the belief that the claim is well founded in law or in fact. The test is whether the true owner could have brought an action against the holder during the period." And see Bispham's Equity (5th ed.), § 261; Tiedeman, Real Prop., § 699; 1 Devlin on Deeds, § 113. But, on the other hand, when the claimant under color of title demands that, by virtue thereof, he shall be accorded constructive adverse possession beyond the bounds of his actual enclosure, and to the extent of his colorable claim, it seems right to deny this effect to his color of title, unless he has acquired it in good faith. See 1 Am. & Eng. Ency. Law, 861, where the doctrine is thus stated: "Such good faith is required in order that a person entering upon land under color of title may be deemed to be constructively in possession of the whole, though actually occupying only a part of the land, or in other words, there can be no constructive possession, unless the occupying claimant relies in good faith upon the validity of his apparent title." And on page 868, it is said: "If the instrument constituting color of title was obtained by fraud on the part of the grantee, or with a knowledge by him that it conveys no title, he cannot have the advantage of an entry under color of title." See *Andrews v. Roseland, etc., Iron Co.*, 89 Va. 393; *Swann v. Young*, 36 W. Va. 57; *Wilson v. Atkinson* (Calif.), 11 Am. St. R. 299; 35 Am. St. R. 617, note. But see 3 Va. Law Reg. 772.

of wild or uncleared lands, in a state of nature, see *Harman v. Ratliff*, 93 Va. 249. In *Core v. Faupel*, *supra*, it is said: "The most usual and decisive acts of actual possession are occupation, residence, cultivation, enclosure, and improvement." See, for full discussion, 1 Am. & Eng. Ency. Law (2nd ed.) 822.

(2). *Open and Notorious*. The defendant's possession, in order to effect an ouster or disseisin of the true owner, must possess such notoriety that the owner may be presumed to have notice of it, so that the owner is guilty of *laches* (neglect) in failing to assert his title during the statutory period against the claimant. See *Core v. Faupel* and *Turpin v. Saunders*, *supra*; also *Lagorio v. Dozier*, 91 Va. 493. For discussion of what amounts to notoriety, see 28 Am. St. Rep. 158-162, note. And see 35 Am. St. R. 617, note, where it is said: "To render possession adverse, it must not only be actual, but also visible, continuous, notorious, distinct, and hostile, and of such a character as to indicate unmistakably an assertion of claim of exclusive ownership in the occupant."

(3). *Exclusive*. For reason, see *Taylor v. Burnside*, 1 Grat. 190; *Core v. Faupel*, 24 W. Va. 245; *Brownsville v. Cavazos*, 100 U. S. 138; *Ward v. Cochran*, 150 U. S. 597; 3 Va. Law Reg. 769; Tied. R. P., § 698.

(4). *Hostile to the owner*. This is manifestly necessary. Thus the possession of a tenant, or of a trustee holding as such, is not hostile to the landlord or *cestui que trust*, for it is in subordination to, and with recognition of, the title of the landlord of *cestui que trust*. In order to render his holding *adverse*, the possessor must throw off allegiance (as it were) to the true owner, defying him and repudiating his title. This can be done by even a tenant or trustee, but not while he holds as tenant or trustee. See *Nowlin v. Reynolds*, 25 Grat. 137; *Bowie v. Poor School Society, etc.*, 75 Va. 300; *Hollingsworth v. Sherman*, 81 Va. 668; *Va. Mining, etc.*,

Co. v. Hoover, 82 Va. 449; *Hodgkin v. McVeigh*, 86 Va. 751; *Oney v. Clendenin*, 28 W. Va. 334.¹

(5) *With claim of title in himself.* This follows from the preceding requisites, and it results that a *mere squatter* on another's lands who is there by *sufferance* and without any claim of title, cannot, no matter how long he stays upon the land, acquire title thereto by adverse possession.

¹ POSSESSION BEGUN IN PRIVACY WITH OWNER.—In *Creekmur v. Creekmur*, 75 Va. 430, 436, it is said by Staples, J.: "The only distinction between this class of cases and those in which no privity existed, is in the degree of proof required to establish the adverse character of the possession. The rule now is that where possession is originally taken or held under the true owner, a clear, positive, and continued disclaimer and disavowal of title, and the assertion of an adverse right to be brought home to the knowledge of the party, are indispensable before any foundation can be laid for the operation of the statute of limitations. The statute does not begin to operate until the possession, before in privity with the title of the true owner, becomes tortious and wrongful by the disloyal acts of the occupying tenant, which must be open, continued and notorious, so as to preclude every doubt as to the character of the holding, or the fact of knowledge on the part of the owner." And see in accord *Hulvey v. Hulvey*, 92 Va. 182, 186.

In addition to the cases cited in text, see (1) as to landlord and tenant: *Wilcher v. Robertson*, 78 Va. 602; *Reusens v. Lawson*, 91 Va. 226; *Swann v. Young*, 36 W. V. 57; (2) as to co-tenants: *Stonestrect v. Doyle*, 75 Va. 356; *Fry v. Payne*, 82 Va. 759; *Buford v. Land and Imp. Co.*, 90 Va. 418; *Lagerio v. Dozier*, 91 Va. 492; *Pillow v. Southw. Imp. Co.*, 92 Va. 144; (3) as to vendee and vendor: *Whitlock v. Johnson*, 87 Va. 323; *Chapman v. Chapman*, 91 Va. 397; *County of Allegheny v. Parrish*, 93 Va. 615; *Flynn v. Lee*, 31 W. Va. 487; *Kern v. Howell* (Pa.), 57 Am. St. R. 641; (4) as to remainderman or reversioner and tenant for life (tenant by the curtesy or in dower): *Dooley v. Baynes*, 86 Va. 644; *Hulvey v. Hulvey*, 92 Va. 182; *Meacham v. Bunting* (Ill.), 47 Am. St. R. 239; (5) as to heirs of husband and widow occupying mansion house and curtilage until dower assigned (C. V., § 2274); *Hannon v. Hounihan*, 85 Va. 429. On whole subject, see 1 Am. and Eng. Ency. Law, p. 797-821.

As to the effect of possession taken and held through a mistake

Such squatter "lies low," and does not dare to rise up and defy the owner to his face. See cases above; also *Creekmur v. Creekmur*, 75 Va. 431. And see *Parkersburg, etc., Co. v. Schultz* (W. Va.), 27 S. E. 255, where it is said: "Mere naked possession of land, without claim of right, is no adverse possession; and no matter how long continued, will not furnish a defence to an action or confer title."

§ 140. **Distinction Between Claim of Title Without Color, and Claim of Title with Color.**—*Color of title* is an *apparently* good title, without the *reality*, as, for example, under an *invalid* deed, or under a *junior* patent to land. In order to constitute adverse possession, it is not necessary that the claim of title should be *with color*; i. e., with a colorable right. When, however, there is a claim only and no color, the adverse possession is restricted to the claimant's *actual enclosure*; whereas if there be a claim *with color therefor*, the adverse possession is not confined to the actual enclosure, but extends *as far as the color extends*; e. g., to the boundaries of the invalid deed, or of the junior patent. See Tied. R. P.,

as to the true location of the boundary, the cases are in conflict. See for discussion 24 Am. St. R. 388-390, note, and 9 Harvard Law Review, 467-470, where the cases are collected, and the better view declared to be that a mistake as to the boundary does not prevent the possessor's title from being adverse. This view rests on the ground that he is in actual possession, with claim of right, and that it does not matter that the possessor was mistaken as to the boundary, and that but for such mistake would not have entered on the land. In other words, adverse possession does not require that the occupant should be a wilful and conscious wrong-doer; and "it is not the intent to dispossess another, but the intent to possess for himself and as his own, which makes the entry on the land of another a disseisin." 24 Am. St. R. 390, note. And see Tiedeman R. P., § 699. Thus in *Caufield v. Clark* (Oreg.), 11 Am. St. R. 845, it is held that one who, by mistake as to boundaries, enters upon and occupies land not embraced in his title, claiming it as his own for the requisite statutory period, thereby becomes invested with the title founded upon a mistake. For the opposite view, see *Finch v. Ullman* (Mo.), 24 Am. St. R. 383.

§ 696; *Creekmur v. Creekmur*, 75 Va. 431; *Core v. Faupel*, 24 W. Va. 245. But it is obvious that there can be no *constructive* possession by reason of color of title, unless he who claims under the invalid deed, or patent, which gives color, has *actual* possession of a part of the land in controversy. *Harman v. Ratliff*, 93 Va. 249; *Breeden v. Haney* (Va.), 29 S. E. 328; *Willamette &c. Co. v. Hendrix* (Oreg.), 52 Am. St. R. 800.¹

¹ CLAIM OF TITLE WITH COLOR.—As to what constitutes color of title, see *Sulphur Mines Co. v. Thompson*, 93 Va. 293, 319, where it is said: "Color of title necessarily implies that the party relying upon it must claim under something that has the semblance of title. A private survey and map, never recorded, not referred to or made a part of the deed under which the party relying on it claimed, cannot be considered color of title." For an examination of the question, what constitutes in Virginia such color of title as will give the possessor *constructive* possession beyond his actual enclosure, see article by F. W. Sims, Esq., 2 Va. Law Reg. 551. The conclusion reached by Mr. Sims is as follows: "Color of title, under which constructive possession will be given, must be by deed or other writing, which purports or contracts to pass title, and which contains sufficient terms to designate the land in question with such certainty that the boundaries thereof can be ascertained by the application of the general rules governing the location of land conveyed by deed." See *Blakey v. Morris*, 89 Va. 717; *Hall v. Law*, 102 U. S. 461. And see *Hulvey v. Hulvey*, 92 Va. 183, where it is held that although a deed of conveyance of real estate from a grantor who has no title conveys no title to the grantee, yet it constitutes color of title. For full discussion, see 1 Am. and Eng. Ency. Law (2nd ed.), 846-861.

For the distinction made in the text between the effect of a claim of title without color, and a claim with color, and that a *colorable claim* gives constructive possession to the extent of the color, see *Taylor v. Burnsides*, 1 Grat. 191-'92; *Hollingsworth v. Sherman*, 81 Va. 668; *Blakey v. Morris*, 89 Va. 717; *Stull v. Rich Patch Iron Co.*, 92 Va. 253; *Hall v. Hall*, 27 W. Va. 468; *Oney v. Clendennin*, 28 W. Va. 35; *Jarrett v. Stevens*, 36 W. Va. 445; *Mullan v. Carper*, 37 W. Va. 215; *Randolph v. Casey* (W. Va.), 27 S. E. 231; *Parkersburg, etc. Co. v. Schultz* (W. Va.), 27 S. E. 255; *Hunnicut v. Peyton*, 102 U. S. 333; 12 Am. Dec. 357-'59, note.

It is stated in the text that a *claim* of title without color is

§ 141. **Application of the Doctrine of Adverse Possession to Conflicting Patents or Deeds to Land.**—Let us suppose that the State grants to A a patent to certain lands, and afterwards grants to B a patent which conflicts with A's; *i. e.*, which covers in the whole or in part the land embraced by A's patent. A is called the *senior* patentee, and B the *junior* patentee, and the land in dispute, covered by both patents, is called the *interlock*. Now, if B enters on part of the land covered by his patent, and occupies it adversely for the statutory period, it becomes a question as to the effect of such possession by B; and this may depend on the part of the land which B occupies, and further on the consideration whether during the statutory period A also occupies a part of the land embraced by his patent, outside of or within the interlock. Four classes of cases are to be considered, but in all of them the principles are the same.

I. *When B's patent covers that of A in part only, the land patented to B lying partly within and partly without the boundaries of A's patent.*

(1). When A has no actual possession, and B has no actual possession. A's senior patent gives to his *constructive seisin* (*Taylor v. Burnside*, 1 Grat. (158), (202)); and as neither has actual possession, A has of course the better right to the interlock. *Cline v. Catron*, 22 Grat. 378; *Carter v. Hagan*, 75 Va. 557; *Holleran v. Meisel*, 91 Va. 143; *Garrett v. Ramsay*, 26 W. Va. 345, 351, 353, 373; *White v. Ward*, 35 W. Va. 418.

(2). When A has no actual possession, but B is in possession of part of his tract *outside of the interlock*. A has

sufficient to give adverse possession of the claimant's *actual* enclosure. And in *Wade v. Johnson* (Ga.), 21 S. E. 569, it is held that possession of land under a color of title, however long continued, will not ripen into a prescriptive title, nor serve for tacking to make out the full term for prescription, if, instead of being attended by a claim of right, such right be expressly disclaimed pending the possession. So *claim of title* is essential in all cases.

the better right to the interlock; for B is outside of the interlock, and on his own land (the junior patent), and is not on A's land at all. Hence A cannot be affected by B's possession of B's own land. B's possession of his own land is rightful, and not adverse to A. *Koiner v. Rankin*, 11 Grat. 420; *Cline v. Catron*, 22 Id. 378; *Turpin v. Saunders*, 32 Grat. 27; *Garrett v. Ramsay*, 26 W. Va. 334; *Trimble v. Smith*, 4 Bibb. (Ky.) 257. See *Sulphur Mines Co. v. Thompson*, 93 Va. 293, 321, where it is said by Buchanan, J.: "Where there are conflicting titles, if the junior claimant settles within his boundary, but *outside of the interlock*, he gains no actual possession of the land in controversy, whether the possession of the senior claimant be actual or constructive only. Where there is no controversy, the rule that possession of a part is possession of the whole is to be taken with reference to the entire tract; but when there is a conflict of title, it is to be taken with reference to such conflict. Without actual possession of some part of *the land in controversy*, the junior claimant can gain no possession of that subject against the better right of the senior claimant. If the law were otherwise, as was said by Judge Baldwin, the lawful owner might be dispossessed, not only without his knowledge, but without the means of acquiring it. *Taylor v. Burnsides*, 1 Grat. 169, 200 (side page 196)." And *a fortiori* will A have a better right when A is in possession of a part of his tract outside of the interlock, or part of the interlock itself. *Ilseley v. Wilson* (W. Va.), 26 S. E. 551.

(3). When A is not in actual possession at all, and B is in possession of part of the interlock. Then B's actual possession of part of the land in controversy (interlock), with color of title to the whole interlock by reason of the junior patent, gives B constructive adverse possession of the whole of the interlock. See *Garrett v. Ramsay*, 26 W. Va. 353, opinion of Green, J.; *Ib.* 373, opinion of Snyder, J. See also *Overton v. Davisson*, 1 Grat. (211), (224); *Koiner*

v. *Rankin*, 11 Grat. 420, 424; *Andrews v. Roseland, etc.*, Co., 89 Va. 393; *Stull v. Rich Patch Co.*, 92 Va. 253; *Harman v. Ratliff*, 93 Va. 249; *Buford v. Cox*, 5 J. J. Marsh. (Ky.) 587; *Clarke v. Courtney*, 5 Pet. 319; *Hunnicutt v. Peyton*, 102 U. S. 395; *Smith v. Gale*, 144 U. S. 509.

(4). When A and B are both in possession of part of the interlock. Then, since A is on the interlock, and has the elder title by reason of the senior patent, B's adverse possession is confined to his actual enclosure. *Overton v. Davisson*, 1 Grat. (224); *Stull v. Rich Patch Iron Co.*, 92 Va. 253, 280; *Garrett v. Ramsay*, 26 W. Va. 357, 374; *Hunt v. Wickliffe*, 2 Pet. 201; *Hunnicutt v. Peyton*, 102 U. S. 333; 1 Am. & Eng. Ency. Law (2nd ed.) 871.

(5). When A is in possession of a part of his tract outside of the interlock, and B is in possession of part of the interlock. Here the doctrine at common law is that B's adverse possession is confined to his actual enclosure. For A is on his tract and has the elder title, and so has constructive possession of all his tract not actually occupied by B. See *Green v. Liter*, 8 Cranch 229; *Hunnicutt v. Peyton*, 102 U. S. 333; 1 Am. & Eng. Ency. Law (2 ded.), 872. But in Virginia an act was passed in 1792 (now found in Code, § 2740) declaring that: "In a controversy affecting real estate, possession of part shall not be construed as possession of the whole, when an actual adverse possession can be proved." It is still unsettled in Virginia whether this statute has altered the common law so as to give B a right to the *whole interlock*, when B's entry upon the interlock is *subsequent* to A's entry on his tract outside of the interlock. *Stull v. Rich Patch Iron Co.*, 92 Va. 253, 281. See *Taylor v. Burnsides*, 1 Grat. 165, 211, where Baldwin, J., held that the statute gave B the better right, and Stanard, J., held that A was entitled to all of the interlock not in B's *actual* possession. But in *Garrett v. Ramsay*, 26 W. Va. 345, the question was decided under the act of 1792 in

favor of B., Green, J., dissenting and preferring the view of Stanard, J., in *Taylor v. Burnsidess*, *supra*. For an able discussion of this open question in Virginia, see 3 Va. Law Reg. 763, article by Mr. H. C. McDowell, Jr., in which it is contended (following judge Green in *Garrett v. Ramsay*) that the act of 1792 is declaratory of the common law, and that A has the better right. And see 3 Va. Law Reg. 843, article by Prof. R. C. Minor, where, upon the construction of the statute, a conclusion is reached in favor of B. The law of West Virginia is now in favor of B in express terms, by a special statute enacted in 1879. See Code W. Va., ch. 90, § 19. And in Virginia it is held that if B has possession of the part of the interlock before the entry of A on his tract outside of the interlock, such subsequent entry of A does not oust the constructive possession by B of the whole interlock, and B can obtain title by adverse possession to the whole interlock. See *Stull v. Rich Patch Iron Co.*, 92 Va. 279, relying upon *Taylor v. Burnsidess*, 1 Grat. 165, 209, as deciding the question.¹

¹ THE OPEN QUESTION IN VIRGINIA.— In *Stull v. Rich Patch Iron Co.*, 92 Va. 281, it is thus stated by Buchanan, J.: “Does the adverse possession of a claimant under a junior title extend to the whole of his tract, or only to the extent of his enclosures, where there are conflicting grants or deeds to land causing an interlock, the claimant under the older title *being* in actual possession of a part of his land outside of the interlock, *when* the claimant under the junior title entered upon and took actual possession of part of the interlock, claiming title to the whole extent of his boundary.” It will be seen that the doubt arises from the fact that the senior patentee or grantee was *already in possession* outside of the interlock at the time when the junior patentee or grantee takes possession of part of the interlock.

The Virginia statute which causes the doubt went into effect December 19, 1792 (see “Acts of General Assembly, 1794,” ch. 76, § 28, p. 119), where the language is the same as in Code of 1887, except that “real estate” has been substituted in the Code for “lands, tenements and hereditaments.” The occasion for the passage of the statute is not manifest, and very diverse views have been, and are, held as to its meaning and construction. It

II. *When the patents exactly coincide.* Here the interlock includes all the land patented to both A and B.

(1). When neither A nor B is in possession. Then, of course, A has the better right, having the senior patent. And this is true, *a fortiori*, where A has actual possession of part of the land, and B is not in possession of any part.

(2). When A has no actual possession, and B has actual possession of part of the land. Then B has adverse possession of the *whole*, under principle laid down in I. (3), *supra*.

(3). When A has actual possession of part of the land, and B has possession of another part. Then B's adverse possession is confined to the limits of his actual possession on principle laid down in I. (4), *supra*.

N. B.—As the two patents precisely coincide, neither A nor B can be in possession of any part of his tract outside of the interlock, and hence it is impossible for the cases under I. (2) and (5), *supra*, to arise.

III. *When B's patent is entirely within A's.* The same

would seem that it should be read thus: "In controversies affecting real estate, possession [by the senior patentee or grantee] of part [of his tract] shall not be construed as possession [by him] of the whole [of his tract] when an actual adverse possession [by the junior patentee or grantee of part of the land in controversy] can be proved." See *Garrett v. Ramsay*, 26 W. Va. 376, where it is said by Snyder, J., delivering the opinion of the court: "The 'real estate in controversy,' referred to in the statute, is necessarily the land in the interlock, because the land outside of this, whether within the elder or the junior grant, is not in controversy; and the words 'actual adverse possession,' used by the statute, just as necessarily and certainly refer to the possession of the junior claimant, for the word *adverse*, if applied to the elder title, would be meaningless, there being no such thing as an adverse possession by the true owner. . . . The owner or elder grantee never holds adversely to the junior claimant, who has no title, but merely a color of title. If the owner is in possession at all, he is there as owner and by virtue of his title, and not as an adverse claimant."

principles apply as under I., *supra*. See *Stull v. Rich Patch Iron Co.*, 92 Va. 253.

IV. *When A's patent is entirely within B's.* The same principles apply as under I., *supra*.

§ 142. **Disabilities of Coverture, Infancy, and Insanity.**—By Code Va. § 2917: "If at the time at which the right of any person to make entry on, or bring an action to recover, any land, shall have first accrued, such person was an infant, married woman, or insane, then such person or the person claiming through him, may, notwithstanding the said period mentioned in § 2915 [fifteen or ten years, as was stated in § 137, *supra*] shall have expired, make an entry on or bring an action to recover such land within ten years next after the time at which the person to whom such right shall have first accrued as aforesaid, shall have *ceased* to be under such disability as existed when the same so accrued, or shall have *died*, whichever shall first have happened." *Buford v. Land and Imp. Co.*, 90 Va. 419. But this indulgence does not apply as to a married woman's *separate estate*. C. V. § 2917. See *Randolph v. Casey* (W. Va.), 27 S. E. 231. And by § 2918, it is provided that in no case shall the indulgence allowed by reason of the above disabilities extend beyond *twenty years after the right of entry or action shall have first accrued*.

§ 143. **Tacking Disabilities.**—This is not allowed. Thus, if when the cause of action arises, the person entitled is an infant, but marries under twenty-one, coverture cannot be added to infancy; and the bar of the statute attaches as soon as ten years elapse after full age. And this is the case, *a fortiori*, if one is an infant when the cause of action arises, and does not marry until some time *after* reaching twenty-one. See *Blackwell v. Bragg*, 78 Va. 529. If, however, *when the cause of action arises*, the owner is both an infant and a *feme covert*, the statute does not begin to run until *both* disabilities cease. See *Wilson v. Branch*, 77 Va. 65.

§ 144. **Period to be Subtracted in Computing Time in Virginia.**—By Code Va., § 2919, the period between April 17, 1861 (secession of Virginia) and January 1, 1869 (expiration of the Stay Law), is to be subtracted in estimating the time which has elapsed under the statute of limitations, and under the doctrine of adverse possession of land. See *Brewis v. Lawson*, 76 Va. 36; *Updike v. Lane*, 78 Va. 132; *Norvell v. Little*, 79 Va. 141; *Hollingsworth v. Sherman*, 81 Va. 668; *Va. Mining Co. v. Hoover*, 82 Va. 449; *Alexander v. Byrd*, 85 Va. 690.

CHAPTER IX.

CO-TENANTS.

Under this head are to be considered (1) Joint Tenants; (2) Tenants by Entireties; (3) Tenants in Common; and (4) Coparceners.

I. *Joint Tenants.*

§ 145. **Definition.**—Joint tenancy is a joint *seisin* of the *freehold* or a joint *possession* of an estate *not of freehold*. This mode of holding feuds was greatly favored in ancient times, as insuring to the lord an adult retainer (or vassal) to attend the lord to the wars, etc.; for the land, and with it the feudal obligations, devolved upon the survivor (or survivors) of several joint tenants, instead of descending in parts to the heirs of each. Besides, the common law “loves not fractions of estates, nor to divide and multiply tenures.” 2 Bl. Com. (193), n. 25.

§ 146. **Unities of Joint Tenants.**—For the four unities which characterize joint-tenancy, see 2 Bl. Com. (180). As to unity of *time*, this was essential where joint tenants received the land by *feoffment*; but it is now settled that under a *devise*, or by a conveyance to *uses*, several may be joint tenants though their estates vest at different times. In a devise or in a deed by way of use, it is the *joint claim by the same conveyance* which makes joint tenants, and not the time of vesting. And in Virginia the same doctrine is doubtless applicable, since 1850, to the statutory deed of grant. See 2 Min. Ins., 403.

§ 147. **Unity of Interest.**—Joint tenants have unity of *interest* in two senses: (a) they have the *same estate* in the land, *i. e.*, each has a fee-simple, fee-tail, etc.; and (b)

they have, as between themselves, *equal shares*, *i. e.*, each is entitled to the same proportion of the rents and profits, and each can convey to a stranger *his interest* in the land, which is just the same as that of each of his companions, viz: one-third if there are three joint tenants, one-fourth if there are four, etc.

§ 148. **Unity of Possession.**—Joint tenants have unity of possession, and this also in two senses. They have, in the first place, unity of possession in the sense in which all tenants who do not hold in severalty have, *i. e.*, they hold the land *together*, and not separately, and each being in rightful possession of *all* the land, no one can sue another for trespass. But, in the second place, unity of possession, as applied to joint tenants, denotes that *oneness* or *entirety* of interest which the law describes by the maxim that joint tenants are seised "*per my et per tout*," *i. e.*, by *nothing and by all*. The meaning is, that joint tenants are not seised, like tenants in common, each of his *undivided share*, but *each joint tenant is seised of all the land*. Survivorship is the necessary result of such holding. For each has *all* together with the rest, and *nothing separately* by himself, which is the meaning of their being seised *per my et per tout*. Hence, when one joint tenant dies, he (or his heir) has nothing *separately*, and all remains with the survivor (or survivors) as before. And as each joint tenant is seised of *all* the land, it follows that one joint tenant cannot convey his interest to his companion by *livery of seisin*, for the other is already seised. Hence, a *release* is the proper form of conveyance by one joint tenant to the other. As to the mode of operation of such release, with the "diversity" according as one of two joint tenants releases to his companion, or one of the three to one only of the other two, see 1 Tho. Co. (765); 2 Id., 514. Under C. V., § 2417, one joint tenant can convey his interest to the other by deed of grant. 2 Min. Ins. (4th ed.), 479. But the law does not push the fiction of one person so far as to deny to each

joint tenant an equal share of the rents and profits; or an equal interest in the land or a conveyance by one joint tenant to a stranger (third person). As to *per my et per tout*, see 2 Bl. Com. (182), where it is wrongly translated "by the half or moiety, and by all." This is a mistake, as "*my*" (or "*mie*") signifies nothing, and not a *moiety*. See Wms. R. P. (136), n. 2; 2 Bl. Com. (182) n. (5).

§ 149. **The Right of Survivorship Between Joint Tenants** (*jus accrescendi*).—This is the great incident of joint tenancy, and grows, as we have seen, out of the doctrine that joint tenants are seised *per my et per tout*. By it, if a deed be made "to A, B and C, *and their heirs*," if C dies first, C's heirs get nothing; but the whole interest *accrues* (accumulates or concentrates) upon A and B. If now B dies next, B's heirs get nothing; but the whole interest accrues to A in severalty, and, on A's death intestate, descends to the heirs of A; so though the gift is in terms "to A, B and C, *and their heirs*," only the survivor's heirs have a chance of inheriting the land. To this right of survivorship (formerly greatly favored) several *maxims* are applicable.

§ 150. **Maxims Applicable to Survivorship.**

(1). *Jus accrescendi præfertur ultimæ voluntati, i. e., survivorship is paramount to a will (ultima voluntas)*, by which one joint tenant (who is not the survivor) endeavors to dispose of his share. The technical reason is said to be that on the joint tenant's death, survivorship takes place *per mortem*, while the will operates *post mortem*; and the *per* precedes the *post*. 2 Bl. Com. (176) n. 20. The real reason would seem to be that the *quality of survivorship* is annexed to the estate in joint tenancy at its original creation, and so must take effect *at the death* of the tenant unless *previously* defeated, as by an alienation of his undivided share by deed in his lifetime. Hence, the *will* of the joint tenant cannot operate on his share, for it certainly does not *precede* the tenant's death; and, therefore, at his

death survivorship takes place by reason of the original inherent quality of the estate.

(2). *Alienatio rei præfertur juri accrescendi*, i. e., an alienation of the land is paramount to the right of survivorship. By *alienation* is meant a *conveyance* of the land itself, as distinguished from a mere *charge* or *encumbrance* put upon it. (See next maxim.) But even as to *conveyance*, a distinction must be made. For while every immediate alienation of the land is paramount to the *jus accrescendi* (even a lease beginning *in futuro*), yet it is not true that every alienation *severs the jointure*; for survivorship may take place *subject to the alienation made*. Thus if one or two joint tenants in fee-simple conveys his share to a stranger *for a term of years*, this is no severance of the jointure, because the lessee has not the seisin; and on the death of either joint tenant survivorship takes place in favor of the other, but *subject to the lease*. The lease, therefore, did not destroy the jointure or prevent survivorship, but nevertheless it was *paramount* to the survivorship. 1 Tho. Co. (749), (751); 4 Com. Dig. Estates, K 5, p. 111; 1 Lom. Dig. 617, 621. But see Freeman, Cot. and Part., § 30, where it is said: "A demise by one of the joint tenants severs the joint tenancy, and turns it into a tenancy in common, although the lease is not to commence until after the lessor's death," citing *Doe v. Read*, 12 East 57; *Roe v. Lonsdale*, Ib. 39; *Clerk v. Clerk*, 2 Vern. 323; *Gould v. Kemp*, 2 Myl. & K. 310. Again, if one of two joint tenants in fee conveys his undivided interest to a stranger *for life*, this is *paramount* to survivorship, but it does not *necessarily* prevent survivorship. For if the life tenant should die in the lifetime of *both* joint tenants, they would again be jointly seised as before the conveyance, with survivorship on the death of either. But if while the stranger lived, and the life estate (and the seisin) was outstanding in him, either joint tenant should die, there could be no survivorship; but the share of the deceased tenant would

descend to his own heirs, leaving the other half for the other tenant. 1 Tho. Co. (764); 2 Min. Ins. 479.

(3). *Jus accrescendi præfertur oneribus*, i. e., the right of survivorship is paramount to encumbrances. See 2 Bl. Com. (183), n. 13. This maxim is essential to the *beneficial* existence of the right of survivorship; for otherwise, though the survivor received the title to the land, it might have to be sold to pay the deceased tenant's debts. Hence, when survivorship takes place, there is neither dower nor curtesy in the deceased tenant's share, nor is the land bound in the hands of the survivor for the other's debts, even though judgments have been obtained against him in his lifetime, nor for any other mere charge or encumbrance put upon the land by the deceased tenant. But a *mortgage* given to secure a debt by the deceased tenant has been held a severance of the jointure, and paramount to the right of survivorship, as amounting to a *disposition* of the land (*alienatio rei*). *York v. Stone*, 1 Salk. 158; *Simpson v. Ammons*, 1 Binney (Pa.), 175 (2 Am. Dec. 425); *Tied. R. P.* 238, n. 5; 2 Bl. Com. (185), n. 7; *Freeman*, Co-tenancy and Partition, § 30.

II. *Tenants by Entireties.*

§ 151. **Definition.**—This estate is to be carefully distinguished from joint tenancy, which, however, it greatly resembles. Tenancy by entireties arises where an estate in land is given, *after marriage*, to a *man and his wife jointly*, who would be joint tenants but for the fact that the husband and wife are in law *one person*; “and from the unity of their persons by marriage, they have the estate entirely as one individual.” 1 Prest. Est. 131. Hence the seisin of the husband and wife in such a case is said to be *per tout et non per mie*; i. e. by *all* and not by *nothing*. It follows that on the death of either husband or wife, *survivorship takes place* between tenants by entireties. During the *coverture*, however, the husband has the control, and he may convey all the land for his life; but he cannot, without the

wife's concurrence, affect the *inheritance*, even as to one-half of the land. Unless she unites in the deed, the tenancy by entireties continues, and the survivor gets all the land. The husband has, therefore, less power to dispose of the land than a joint tenant; for the latter can always convey his *undivided interest*. But if a man and woman are joint tenants *before marriage*, they remain joint tenants and their intermarriage does not convert them into *tenants by entireties*. 2 Bl. Com. (182) n. 10.

§ 152. Abolition of Survivorship Between Joint Tenants.

—This right for which there were, as we have seen, substantial feudal reasons has been abolished generally in the United States. This was done in Virginia as to *joint tenants*, as early as July 1st, 1787, in these words: "When any joint tenant shall die, whether the estate be real or personal, or whether partition could have been compelled or not, his part shall descend to his heirs, or pass by devise, or go to his personal representative, subject to debts, curtesy, dower or distribution, as if he had been a tenant in common." See 1 Rev. Code (1819) p. 359 (ch. 98, § 2); Code (1887) § 2430. But § 2431 provides that § 2430 shall not apply "to an estate which joint tenants have as *executors* or *trustees*, nor to an estate conveyed or devised to persons in their own right, when it manifestly appears, from the tenor of the instrument, that it was intended that the part of the one dying should then belong to the others. Neither shall it affect the mode of proceeding on any joint judgment or decree in favor of, or on any contract with two or more, one of whom dies." And to abolish *survivorship* between joint tenants does not abolish *joint tenancy* which still continues with its *other* incidents. See *Patton v. Hoge*, 22 Grat. 443.

§ 153. Abolition of Survivorship Between Tenants by Entireties.—We have seen that at common law survivorship is an incident common to joint tenancy and to tenancy by entireties. But while this is so, the two *estates* are by no

means identical, and it is held that a statute abolishing survivorship between joint tenants *does not apply to tenants by entireties*, who are not joint tenants, though occupying a somewhat similar relation. We have seen that in Virginia, as between joint tenants, survivorship was abolished as early as July 1, 1787; but this act was held to have no application to tenants by *entireties*. See *Thornton v. Thornton*, 3 Rand. (Va.) 179; *Norman v. Cunningham*, 5 Grat. 63. And survivorship between tenants by entireties continued in Virginia, as at common law, until July 1, 1850, when it was *partially* abolished. See Code (1849) ch. 116, § 18, enacting as follows: "And if hereafter an *estate of inheritance* be conveyed or devised to a husband and his wife, one moiety of such estate shall, on the death of either, descend to his or her heirs, subject to debts, curtesy, or dower, as the case may be." It will be seen that the above statute is confined to *estates of inheritance* in lands. But by Code (1887), taking effect May 1, 1888, tenancy by entireties is itself abolished, except where the deed or will *manifests an intent* that it shall continue. 2 Min. Ins. (4th ed.) 471. For § 2430 enacts: "And if hereafter *any* estate, real or personal, be conveyed or devised to a husband and his wife, they shall take and hold the same *by moieties*, in like manner as if a distinct moiety had been given to each by a separate conveyance." But § 2431 declares that this shall not apply "when it appears from the tenor of the instrument that it was intended the part of the one dying should then belong to the others."¹

¹ TENANCY BY ENTIRETIES.—It has usually been held that the Married Woman's Acts, making the property of the wife her legal separate estate, do not affect the creation of a tenancy by entireties upon a devise or grant of land to a husband and his wife. See 51 Am. St. R., 372, note. But the Virginia statute above cited, Code § 2430, undoubtedly abolishes tenancy by entireties, turning it into a tenancy in common, by declaring that husband and wife shall "*take and hold*" the estate conveyed or devised by moieties "*in like manner as if a distinct moiety had been given to each by a separate conveyance.*" And Prof. Minor says (2

§ 154. **Zollman v. Moore.**—The importance of distinguishing tenants by entireties from joint tenants, and of bearing in mind the different dates at which survivorship was abolished between them, is shown by the case of *Zollman v. Moore*, 21 Grat. 313. In this case, the father of the wife, by a deed of gift made in 1827, conveyed the land to B and F (husband and wife) and their heirs. B died in 1863, leaving F surviving him. F was advised by counsel that she was entitled to only one-half of the land, and that the other half descended to B's heirs; and so consented to a sale of the land, and a division of the purchase-money between herself and her children. The land was sold to Zollman in 1863, and paid for in Confederate money. After the war, F filed a bill to set aside the sale to Zollman, she being then advised that, on the death of B, she was entitled to the whole land, instead of to one-half merely.

Minn. Ins., 477): "It would seem that now, under the Code of 1887, in case of tenancy by entireties, the parties may *separately* aliene their respective shares." A question might possibly be raised, however, as to whether tenancy by entireties is embraced by the exception in § 2431, declaring that § 2430 shall not apply "to an estate conveyed or devised to persons in their own right, when it manifestly appears, from the tenor of the instrument, that it was intended that the part of the one dying should then belong to the *others*."

In *Hunt v. Blackburn*, 128 U. S. 464, it is said by Fuller, C. J.: "Undoubtedly, at common law husband and wife did not take, under a conveyance of land to them jointly, as tenants in common or joint tenants, but each became seised of the entirety, *per tout et non per my*; the consequence of which was, that neither could dispose of any part without the assent of the other, but the whole remained to the survivor under the original grant. . . . But it was also true at common law that as, "in point of fact, and agreeable to natural reason, free from artificial deductions, the husband and wife are distinct and individual persons, . . . where lands are granted to them as tenants in common, thereby treating them without any respect to their social union, they will hold by moieties, as other distinct and individual persons would do.'"

The bill was dismissed on the ground that a mistake of law will not be relieved against, certainly not as against a *bona fide* purchaser for value; and so F lost her land. Here F was clearly entitled to the whole land, and the advice of her lawyer was plainly erroneous. For B and F were not *joint tenants*, but *tenants by entireries*, and so survivorship as between them was not abolished by the statute taking effect July 1, 1787, which applied to joint tenants only. And as to the statute taking effect July 1, 1850, which *did* abolish survivorship between tenants by entireries of estates of inheritance, this had no application, not being retrospective, to a deed made in 1827. If the deed had been made after July 1, 1850, then F would have been entitled to one-half only of the land, and the other half would have descended to B's heirs, subject, however, to a right of dower in favor of F. The mistake of counsel may have been caused (1) By not distinguishing between *joint* tenancy, and tenancy by *entireries*; or (2) By not advertg to the fact that survivorship between tenants by entireries continued until July 1, 1850, in Virginia; or (3) By not examining the date of the deed, and supposing it was after July 1, 1850, or (4) By supposing that the act of July 1, 1850, was *retrospective*. But however occasioned, the result was the same, and the widow lost her land.

III. *Tenants in Common.*

§ 155. **Nature of Tenancy in Common.**—Tenants in common need have no unity but unity of possession, and that only in the sense of *holding together*, and not in severalty. 2 Bl. Com. (192); *Carnel v. Lynch*, 91 Va. 114. They differ widely from joint tenants in the nature of their seisin, which is not joint, but several. Each has seisin only of his part; and though that part is not in fact separate from the residue, yet in legal idea it is separate. Hence the mode of conveyance by one tenant in common to another is by livery of seisin, which each can make of his own part; where-

as joint tenants must release the one to the other, as we have seen. As to *suits* by tenants in common at common law, see 1 Tho. Coke, 777-782; *Clarkson v. Booth*, 17 Grat. 490. By Code Va. § 3256: "Tenants in common *may* join or be joined as plaintiffs or defendants." At common law *joint* tenants *must* join and be joined.¹

IV. *Coparceners.*

§ 156. **Nature of Coparcenary.**—Coparceners are those who have become entitled *by descent* as co-heirs. 2 Bl. Com.

¹ CREATION OF TENANCY IN COMMON.—See 2 Bl. Com. (Sharsw. ed.) (180), n. 3, (192), n. 25, where it is said that in wills, the expressions "equally to be divided," "share and share alike," "respectively between and amongst," have been held to create a tenancy in common. And this is now true of these and similar expressions, not only in wills but also in deeds. 2 Min. Ins. (4th ed.), 467, 496; Freeman, Cot. & Part., §§ 23, 25; *Skipwith v. Cabell*, 19 Grat. 758, 787.

It is highly important to decide, as to legacies or devises given to two or more by will, whether they take as joint tenants or tenants in common, in order to determine the effect of the death of one or more of the co-tenants in the lifetime of the testator. If they are tenants in common, each has a separate interest, and the death of any one before the testator causes a lapse of his share at common law (1 Jarman, Wills (340); Freeman, Cot. & Part. § 109), which now in Virginia, by C. V. § 2523, would pass to such tenant's issue, if he leaves issue who survive the testator. But it is otherwise if they are joint tenants. In Jarman on Wills, p. 340, the law is thus stated: "Where there is a devise or bequest to a plurality of persons as joint tenants (*i. e.*, who are not made tenants in common), no lapse can occur unless *all* the objects die in the testator's lifetime; because as joint tenants take *per my et per tout*, or, as it has been expressed, 'each is a taker of the whole, but not wholly and solely,' any one of them existing when the will takes effect will be entitled to the entire property. Thus, if real estate be devised to A and B, or personal property be bequeathed to A and B, and A die in the testator's lifetime, B, in the event of his surviving the testator, will take the whole." See also 1 Jarman, Wills (353); 3 Lom. Dig. (112); Freem. Cot. & Part. § 28; 2 Min. Ins. (4th ed.), 1049.

Is the doctrine above stated affected by Code Va. § 2430,

(187). Hence, only estates of inheritance can be held by tenants in coparcenary; whereas not only estates in fee simple or fee tail, but also for life or for years may be held in joint tenancy and in tenancy in common. The seisin of coparceners is to some extent *joint*, and to some extent *several*. Hence, one parcener may convey to another either by feoffment or by release. It must also be observed that joint tenants and tenants in common always take by *purchase*, *i. e.*, by act and agreement of the parties; and in this they both differ from parceners who take by *descent*, *i. e.*, by operation of law. It follows from this that in several respects the law as to joint tenants and tenants in common is the same, while a different rule prevails as to coparceners.¹

abolishing survivorship between joint tenants. It seems not. On the ground that the surviving joint tenant does not take the whole by survivorship from the other joint tenant (as the estate was never vested in both by the death of the testator), but he takes by the devise or bequest of the testator, whose intention it is, as shown by uniting their names, and making them *potential* joint tenants, that if the number of takers shall be lessened by death or otherwise (as if some, though living at the testator's death, cannot or will not take), the whole shall pass to the other, or others. See Freeman, § 28; 2 Min. Ins. 1049.

¹ PRIVACY BETWEEN CO-TENANTS.—In *Turner v. Sawyer*, 150 U. S. 578, 586, it is said: "It is well settled that co-tenants stand in a certain relation to each other of mutual trust and confidence; that neither will be permitted to act in hostility to the other in reference to the joint estate, and that a distinct title acquired by one will enure to the benefit of all. . . . We think the general rule as stated in *Bissell v. Foss*, 114 U. S. 252, 259, should apply; that 'such a purchase' (of an outstanding title or encumbrance upon the joint estate for the benefit of one tenant in common) 'enures to the benefit of all, because there is an obligation between them, arising from their joint claim and community of interest, that one of them shall not affect the claim to the prejudice of the others.'" See *Pillow v. Southwest Imp. Co.*, 92 Va. 144; *Battin v. Woods*, 27 W. Va. 58; *Gilchrist v. Beswick*, 33 Id. 168. And see the same doctrine laid down in Freeman, Cot. & Part., § 154. But in § 155 it is stated that the rule is not always applicable to tenants in common. "Joint tenants, tenants

Let us now consider, as to the several kinds of co-tenants, *trespass, waste, account and partition*.

§ 157. **Trespass.**—As a general rule, one co-tenant cannot be guilty of trespass against the other, because the possession is undivided, and each tenant has a right to enter upon *any part* of the land. But if the act of one co-tenant amounts to the *destruction* of the property, or to the *ouster* of his companion, then an action of trespass will lie against him. Freeman on Cot. and Part., §§ 298-302; Bigelow on Torts, 171; *Stonestreet v. Doyle*, 75 Va. 356. As to ejectment for the ouster of one co-tenant by another, see 50 Am. St. R. 843-'45, note.

§ 158. **Waste.**—No tenant at common law is liable for waste to his co-tenant. The statute of 13 Ed. I., chap. 22, made joint tenants and tenants in common responsible for waste, but it did not extend to *coparceners*, on the ground that *as they could compel partition*, they could thus save themselves from injury. 2 Bl. Com. (194). In Virginia, however, it is enacted (Code, § 2776): "If a tenant in com-

by entirety, and coparceners," it is said, "always hold by and under the same title. Their union of interest and of title is so complete that, beyond all doubt, such a relation of trust and confidence unavoidably results therefrom that neither will be permitted to act in hostility to the interests of the other in reference to the joint estate. Tenants in common, on the other hand, may claim under separate conveyances, and through different grantors. Their only unity is that of right to the possession of the common subject of ownership. . . . But an examination of the decisions clearly shows that tenants in common are not necessarily prohibited from asserting an adverse title. If their interests accrue at different times, and under different instruments, and neither has superior means of information respecting the state of the title, then either, unless he employs his co-tenancy to secure an advantage, may acquire and assert a superior outstanding title, especially where the co-tenants are not in joint possession of the premises." And see this exception as to tenants in common, under some circumstances, recognized in *Turner v. Sawyer*, 150 U. S. 576; but it was held inapplicable in that case.

mon, joint tenant, or *parcener* commit waste, he shall be liable to his co-tenants jointly or severally for damages.

§ 159. **Account.**—At common law, although one co-tenant took the whole profits, no action of *account* lay against him, unless the receiving co-tenant had been made their *bailiff* by his companions. See 2 Bl. Com. (183-'84); 1 Tho. Coke (787). But to remedy this defect of the common law, the statute of 4 and 5 Anne, ch. 16, gave an action of account in favor of one joint tenant or tenant in common against another "for receiving more than comes to his just share and proportion." And the Va. Code, § 3294, is to the same effect. But neither the English nor the Virginia statute mentions *coparceners*; the action of account is given to joint tenants and tenants in common only. But equity has always entertained a bill for account by one coparcener against another; and such bill may also be filed by a joint tenant or tenant in common. *Early v. Friend*, 16 Grat. 21; 2 Min. Ins. (4th ed.), 506.¹

¹ ACCOUNTING BY PARCENERS.—In *Fry v. Payne*, 82 Va., 759, it is assumed, without discussion, that Code of Va., § 3294, giving an action on account to join tenants and tenants in common, extends to parceners. But in *Ward v. Ward*, 40 W. Va., 611 (52 Am. St. R., 911), there is an elaborate examination of the question, and the conclusion is reached that the West Virginia Statute (same as that in Virginia) does not embrace parceners, and that they cannot, even in equity, demand an account of use and occupation; the reasoning of Prof. Minor (2 Min. Ins., 506) being disapproved. But in note to *Ward v. Ward* (52 Am. St. R.), 930, it is said: "No opinion other than that in the principal case, has, so far as we can ascertain, considered whether the statute of Anne and similar enactments apply to parceners. It is true that they are not mentioned in the statute, but the wrongs it was intended to redress apply to them as well as to other co-owners, and we should be much surprised at a decision holding that a coparcener receiving the entire rents of the common property was under no obligation to account therefor; and yet the liability to account for rents received, where the one party has not collected them as bailiff or agent of the other, is dependent on the statute." See also *Ward and Ward*, and note thereto (52 Am. St. Rep. 934-941), for a discussion of the subject of the liability of one co-

§ 160. **Receiving More than Comes to His Just Share and Proportion.**—These words occur in the English statute giving to joint tenants and tenants in common a right to bring action of account. A question arose in England in *Henderson v. Eason*, 79 E. C. L. R., 701, as to the meaning of “receiving,” and it was held that the co-tenant was bound to account when he *receives money or something else which a third person gives or pays* for the use of the common property, and of which such tenant retains more than his just share or proportion; and that the statute does not render a co-tenant accountable who *occupies* a house owned in common, or who occupies and cultivates the common land; as such tenant merely occupies and enjoys, taking the profits to himself, but not receiving them *from a third person*. The result is that one co-tenant cannot, under the statute, any more than at common law, keep out of the possession, and make the other who occupies accountable to him. But if neither occupies, and one receives *from a third person* in possession more than comes to his just share and proportion, the one receiving must account to the other for the other’s share. And this construction of “receiving” is followed in many of the American States. See 52 Am. St. R., 924-934, where all the cases are collected, and a preference is expressed for the English rule, except when the occupying tenant has been guilty of the *ouster* of his fellow tenant.

§ 161. **Receiving More than His Just Share and Proportion in Virginia.**—The statute of Anne containing these words was re-enacted in Virginia *before* the decision of *Henderson v. Eason*, *supra*, which decision was, therefore, not

tenant to another for expenditures made upon their common property. It is there said: “For expenditures made upon the common property, we doubt whether there is any instance in which one co-tenant can be held personally answerable to another, in the absence of an agreement, either made in direct terms, or implied from the conduct of the parties, and the attendant circumstances.”

binding on the Virginia court. See *Parramore v. Taylor*, 11 Grat. 220. The question as to what is meant by "receiving" arose in Virginia in *Early v. Friend*, 16 Grat., 21, and the court declined to follow *Henderson v. Eason*, and construed the word "receiving" as follows: "Whenever the nature of the property is such as *not to admit* of its use and occupation by several, and it is held and occupied by one only of the tenants in common, or whenever the property, though *capable* of use and occupation by several, is yet so used and occupied by one as to *exclude* the others, he receives 'more than his just share and proportion,' in the meaning of the statute, and is accountable to the others." And the same construction is adopted in West Virginia and many other states. *Ward v. Ward*, (W. Va.), 52 Am. St. R., 911, and monographic note; *McGahan v. Bank*, 156 U. S., 218, 236, a case arising under the law of South Carolina.

But even under the Virginia rule it is possible for one co-tenant to receive profits from the common property without being liable to account to the others. For such tenant has a right to occupy the common property, though not to the exclusion of the others. But the occupation of one does not *necessarily* exclude the others; and when it does not exclude them, they cannot, by voluntarily remaining out of possession, hold him responsible. Thus, if there are two houses of equal value, and one of two co-tenants occupies one house, leaving the other to his companion; or if there should be large estates or extensive mines held in common, and one cultivates or mines a part of the property only; in neither of these cases would the occupying tenant be accountable to the other. But if there were but one small house, and one tenant occupied it all with his wife and children; or if there should be a hotel or furnace; the occupation by one would be *in its nature exclusive*, and he would be held to account to the other or others. As to the *mode* of accounting, whether for actual profits less expenses, or for an annual rent, see *Ruffners v. Lewis*, 7 Leigh, 720; *Graham v. Pierce*, 19 Grat., 28; *Newman v. Newman*, 27

Grat., 714; *White v. Stuart*, 76 Va., 546; *Fry v. Payne*, 82 Va., 759; *Dodson v. Hays*, 29 W. Va., 578; 52 Am. St. R., 931, 934.

§ 162. **Partition.**—Parceners only at common law could *compel* partition; but joint tenants and tenants in common could not do so until the statute of 31 Henry VIII. The reason of this diversity at common law was that as parceners held together by *operation of law* (i.e., by descent as co-heirs), it would have been unjust to compel any one of them to so hold against her will (parceners at common law were females only); but as joint tenants and tenants in common became so *by their own act* (or, at least, *acceptance*), the law would not allow a relation entered into by mutual consent to be terminated except by mutual consent. Holding in severalty, however, is so much more beneficial to all parties that it is now the policy of all legislation to encourage and facilitate partition. And by Code Va., § 2562, amended by Acts, 1897-'98, c. 452, p. 488: "Tenants in common, joint tenants, and coparceners shall be compelled to make partition; and a lien creditor or [of] any owner of undivided estate in real estate may also compel partition for the purpose of subjecting the estate of his debtor, or the rents and profits thereof, to the satisfaction of his lien. Any court having general equity jurisdiction of the county or corporation wherein the estate or any part thereof is, shall have jurisdiction in cases of partition; and in the exercise of such jurisdiction may take cognizance of all questions of law affecting the legal title that may arise in any proceedings." As to the right of a lien creditor to compel partition, the statute settles a doubt. See 2 Va. Law Reg., 423. That the provision of the statute giving to a court of equity in a suit for partition authority to take "cognizance of all questions of law affecting the legal title" is constitutional, see *Pillow v. Southwest Improvement Co.*, 92 Va., 144. For an instance of the exercise of this jurisdiction, see *Bradley v. Zehmer*, 82 Va., 685. See also *Moore v. Harper*, 27 W. Va., 362; *Hinton v. Bland*, 81 Va., 588. That a Virginia court

has no jurisdiction to decree partition of land lying in another state, see *Wimer v. Wimer*, 82 Va., 890; *Pillow v. Southwest Improvement Co.*, 92 Va., 144; 1 Va. Law Reg., 673, note by Judge Burks.

§ 163. **Partition in Equity.**—The mode is for the court to appoint commissioners who enter on and survey the estate, and make a *return* to the court. The return, if satisfactory, is confirmed by the court. The confirmation, however, did not, like a judgment on the common law writ of partition—"that the partition remain firm and stable forever"—operate on the *legal* title to the land so as to divest the parties of their undivided shares, and invest them with their respective allotments. *Gay v. Parpart*, 106 U. S. 679, 691; *Langdell Eq. Pl.* (2d ed.), § 43, n. 4. The partition, therefore, required to be perfected by *mutual conveyances* made by the co-tenants in pursuance of the decree. See *Bolling v. Teel*, 76 Va. 487; *Bispham's Eq.*, §§ 490–493; *Freeman, Cot. and Part.*, § 396, § 427. But to avoid the necessity for mutual conveyances, the Code of Va., § 2565 enacts: "A decree heretofore or hereafter made, confirming any partition or allotment in a suit for partition, shall vest in the respective parties, between or to whom the partition or allotment is made, the title to their shares under the partition, in like manner and to the same extent as if the said decree ordered such title to be conveyed to them, and the conveyance was made accordingly."¹

¹PROCEDURE ON PARTITION.—In *Brooks v. Hubble* (Va.), 27 S. E. 585, it is said: "It seems to be well settled that by the common law coparceners could make partition of their land by parol as well as by deed; and that this was the law in this State until changed by § 2413 of the Code of 1887. *Jones' Devisees v. Carter*, 4 Hen. & M. 190; *Bolling v. Teel*, 76 Va. 487; *Yancey v. Radford*, 86 Va. 638; 1 Lom. Dig. 494, and 2 Min. Inst. 439." By § 2413 of Code Va., it is declared that no voluntary partition of land by coparceners shall be made *except by deed*.

As to who may maintain suit for partition, it is said in *Carneal v. Lynch*, 91 Va. 114, 119: "We are, therefore, of opinion that under the statutes of Virginia [C. V., §§ 2432, 2562], as well as upon

§ 164. **Sale, Instead of Partition in Kind.**—It was formerly held, even in equity, that the *difficulty* of making partition *in kind* was not sufficient to justify the court in refusing to make it, and that if the parties did not *agree* to waive partition in kind, it was an absolute right, though the result might divide a single house or mill between two or more. The

precedent, a tenant for life in one moiety of property may maintain a suit against those who own the estate in remainder of the said moiety, whether *in esse* or not, and the fee-simple owners of the other half, and compel partition of said property; and if not susceptible of partition in kind, may have a sale and division of the proceeds."

As to owelty (equality) of partition, see Freeman, Cot. and Part., § 507, where it is thus defined: "When an equal partition cannot be otherwise made, courts of equity may order that a certain sum be paid by the party to whom the most valuable property has been assigned. The sum thus directed to be paid to make the partition equal is called owelty." For an example of owelty, see *Jameson v. Rixey* (Va.), 26 S. E. 861, where it is said: "A lien for owelty of partition partakes of the nature of a vendor's lien, and constitutes a prior encumbrance upon the land on which it is charged, and follows the land into whosoever hands it may come." And see *Martin v. Martin* (Va.), 27 S. E. 810, where it is held that in partitioning lands which are incapable of exact or fair division, a court of equity has power to charge one portion with an easement in favor of another portion, to make the partition equitable.

As to improvements put by one co-tenant on the common property, it is held in *Ballou v. Ballou* (Va.), 26 S. E. 840, that when a co-tenant has improved the property at his own expense, equity will not grant partition without directing an account and suitable compensation for the improvements. And it is not necessary for the improving tenant to show the assent of his co-tenants to such improvements, nor a promise on their part to contribute their share of the expense, nor a request by him to join in the improvements, and their refusal. But this is an equity which arises *in the suit for partition*. No action of assumpsit can be brought under the above circumstances to recover any part of the cost of the improvements from the other tenants. See Freeman, Cot. and Part., § 510; *Ward v. Ward* (W. Va.), 52 Am. St. R. 911, and 938-941, note.

court could not order a sale and a division of the proceeds. The doctrine of partition in kind, as has been well said, was applied "disastrously to the *interests* of all parties, but in magnanimous vindication of their *rights*." 2 Minor's Ins. 421. But now in England, by statute, a court of equity may order a sale of property instead of partition. 31 and 32 Vict. ch. 40. And this is now the law in the United States generally. By Code Va. § 2563: "Any two or more of the parties, if they so elect, may have their shares laid off together, when partition can be conveniently made in that way." And by § 2564: "When partition cannot be conveniently made, the entire subject may be allotted to any party who will accept it, and pay therefor to the other parties such sums of money as their interests therein may entitle them to; or in any case now pending, or hereafter brought, in which partition cannot be conveniently made, if the interests of those who are entitled to the subject or its proceeds will be promoted by a sale of the entire subject, or allotment of part, and sale of the residue, the court, notwithstanding any of those entitled may be an infant, insane person, or married woman, may order such sale, or such sale and allotment, and make distribution of the proceeds of the sale, according to the respective rights of those entitled, taking care, when there are creditors of any deceased person who was a tenant in common, joint-tenant, or co-parcener, to have the proceeds of such deceased person's part applied according to the rights of such creditors." For further provisions, reference is made to the statute.¹

¹ SALE INSTEAD OF PARTITION.—In *Roberts v. Coleman*, 37 W. Va. 143, 157, it is said by Brannon, J., with reference to the West Virginia statute (same as that of Virginia): "By common law partition must be in kind, however inconvenient. By statute introduced into the Code of Virginia of 1849, this inconvenience was remedied by the provision that in any case 'in which partition cannot conveniently be made, if the interests of those who are entitled to the subject, or its proceeds, will be promoted by a sale,' etc., a sale may be decreed. Such is our Code of 1887 (ch. 79, § 3). Now, remembering that the common law gave right to

§ 165. **Hotchpot.**—This is a matter of great importance under the American statutes. We shall discuss the subject in connection with the Virginia statute (Code, § 2561), which is as follows: “Where any descendant of a person dying intestate as to his estate, or any part thereof, shall have received from such intestate in his lifetime, or under his will, any estate, real or personal, *by way of advancement*, and he, or any descendants of his [see *Coffman v. Coffman* (W. Va.), 23 S. E. 523] shall come into the partition and distribution of the estate, with the other parceners and distributees, *such advancement shall be brought into hotchpot* with the whole estate, real and personal, descended or distributable, and thereupon such party shall be entitled to his proper portion of the estate, real and personal.” The effect of this statute is to extend the doctrine of hotchpot almost as far as it could be carried. *Biedler v. Biedler*, 87 Va. 300.

have partition in kind, and this statute, being an innovation upon the common law, and, taking away from the owner the right to keep his freehold in kind, to justify a sale in any case it must come within the statute, and it must appear in some way by the record both that partition cannot be conveniently made, and that the interests of the owners will be promoted by sale. Such is the letter of the statute. I think so, as did Judge Staples in *Zirkle v. McCue*, 26 Grat. 532.” And see *Casto v. Kintzel*, 27 W. Va. 750.

As to the method of ascertaining in a suit for partition whether or not the land can be conveniently divided, it is said in *Stevens v. McCormick*, 90 Va. 735: “The appellants insist that the usual and correct practice is to appoint not less than five commissioners to go upon the land, any three of whom may act, and to report their views on the subject to the court. This was not done in the present case, but the matter was referred to a master, whose report was confirmed. In *Zirkle v. McCue*, 26 Grat. 532, Judge Staples speaking for the court said that to warrant a decree for a sale, it must appear that partition cannot be conveniently made, and that the interests of the parties will be promoted by a sale, but that these facts need not appear from the report of commissioners, or by the depositions of witnesses. It is sufficient, he added, if the facts appearing in the record reasonably warrant the decree of sale. In other words, the matter of procedure is left to the discretion of the court.”

§ 166. What is an Advancement?—"The true notion of an advancement is the giving by anticipation of the whole or a part of what it is supposed the child would be entitled to on the death of the parent." *Chinn v. Murray*, 4 Grat. 438; *Darne v. Lloyd*, 82 Va. 859; 27 Am. St. R. 748, note. It is an anticipatory gift by way of advancement to the child, *to be accounted for by him at the father's death*, in the distribution of his estate, in order that all the children may then receive equal shares. An advancement differs from a *pure gift* in that it is to be deducted hereafter in estimating the receiver's portion of the giver's estate, and it differs from a *debt* in that the receiver need not account for it if he chooses to allow the residue of the property to go to the other heirs or distributees.

§ 167. What is the Evidence that a Gift is by Way of Advancement?—This a question of *intention*. The character of the gift should be such as to show that it is really *anticipatory*, and that in making it the father has in mind the *final division* of his property. It is usually by way of portion on marriage, or to set up in business. But it seems that any gift to a child, whether of land or money, to a large amount, is presumed *prima facie* to be an advancement, though it may be shown that it was *not* so intended. *Watkins v. Young*, 31 Grat. 84; *McDearman v. Hodnett*, 83 Va. 281; *McClanahan v. McClanahan*, 36 W. Va. 34; *Roberts v. Coleman*, 37 W. Va. 143; 40 Am. St. R. 539, note. But on the other hand, money expended in the maintenance and education of a child is not to be deemed an advancement, unless it clearly appears that such was the parent's intention. Nor are mere presents,

In *Turner v. Dawson*, 80 Va. 841, it is held that when a court of equity causes land to be sold for partition, the person entitled to the proceeds, if *sui juris*, may elect to hold them as realty or personalty; but that if such person does not elect, or is not *sui juris*, and so is incapable of electing, the court will consider the proceeds as realty, and subject, as to succession and marital rights, to the rules of law governing real estate.

such as money, a gold watch, a horse, etc., to be considered advancements; nor permissive and precarious benefits. *Riddle's Estate*, 19 Pa. St. 43; *Edwards v. Freeman*, 2 P. Wins. 436; *Williams v. Stonestreet*, 3 Rand. 559; 1 Tuck. Com. Book 2, 181. For full discussion, see Miller's Appeal, 40 Pa. St. 57; S. C. 80 Am. Dec. 555, and note 559-566; also see *Gregory v. Winston*, 23 Grat. 102; *Lewis v. Henry*, 28 Id. 192; *Biedler v. Biedler*, 87 Va. 300; *Moorman v. Crockett*, 90 Va. 155; *Brock v. Brock*, 92 Va. 173; *Brock v. Latimer* (Kansas), 21 Am. St. R. 292.¹

¹GIFT BY WAY OF ADVANCEMENT.—When a child has received from his father a sum of money, it may have been a loan, by which a debt was incurred to the father; a gift by way of advancement; or a pure gift, involving neither the obligation of payment, nor the necessity of bringing into hotchpot as the condition of sharing in the *post mortem* distribution of the father's estate. As between a loan, a gift, and an advancement, the presumption is said to be in favor of an advancement, because of its tendency towards that equality of distribution among the children which is presumed to have been intended. Patterson's Appeal, 128 Pa. St. 269 (27 Am. St. R. 748, note). In *Brock v. Latimer* (Kansas), 21 Am. St. R. 292, it is held that an absolute promise in the form of a note to pay a certain sum of money, given by a child to a parent, may be shown by parol evidence to be intended between the parties to it as a mere receipt or memorandum to show that the parent has made an advancement of that amount to the child, and that it was the intention of the parent that it should never be collected. And in *Darne v. Lloyd*, 82 Va. 859, it is held that what was in its inception a loan may be subsequently converted by will into an advancement. The court says: "A testator can dispose of his estate by will just as effectually as he could by gift during his life, and, if he pleases, turn a loan into an advancement, or, to speak more accurately, require that it may be treated as an advancement." And see *Moorman v. Crockett*, 90 Va. 185. But, on the other hand, an advancement is an irrevocable gift, and a donor cannot change what was an advancement into a debt or trust. See 21 Am. St. R. 292, 295, and cases cited; 80 Am. Dec. 564, note; 1 Am. & Eng. Ency. Law (2d ed.) 780.

In *Bruce v. Slemp*, 82 Va. 353, it is held that a gift by a father to his daughter's husband during coverture is deemed an ad-

§ 168. **To Whom, and by Whom, Can an Advancement be Made?**—The language of the Virginia statute is: “When any *descendant* of a person dying intestate,” etc. It follows, therefore, that the person advanced must be a *descendant* of the person advancing; and that only a *lineal* ancestor can make a gift by way of advancement, and not a son to his mother, nor a brother to his sister, etc. But “descendant” is equivalent to “issue,” and includes grandchildren, etc., as well as children. But in some of the states, advancements are confined to *children*. 4 Kent’s Com., 419.

§ 169. **What Property Can be Given by Way of Advancement; and With What Property Shall it be Brought into Hotchpot?**—This will depend upon the statutes. The Virginia statute answers both questions by saying, “any estate, real or personal.” This makes *hotchpot* indeed, “not one thing alone, but one thing with other things together.” For the common law, see 2 Bl. Com. (515).

§ 170. **For Whose Benefit is Property Brought into Hotchpot?**—If a man dies leaving a *widow* and several children, one of whom he has advanced in his lifetime, and such child brings the advancement into hotchpot, this will increase the shares of the other children, but not that of the widow, who takes her share as distributee in the estate of the intestate of which he died possessed, and who has no interest whatever in the advancement. See *Knight v. Oliver*, 12 Grat., 33; *Per-singer v. Simmons*, 25 Id., 238; 80 Am. Dec. 559, *et seq.*

§ 171. **As at What Time is the Advancement Valued?**—The rule is that advancements are valued at the *date of the gift*, and not as at the *death* of the ancestor. And the person advanced cannot be charged, in estimating the amount of the

vancement to the daughter; and this is again decided in *McDearman v. Hodnett*, 83 Va. 281, where it is held that the Married Woman’s Act (Acts 1876-’77, p. 333) does not affect the doctrine. See 80 Am. Dec. 561, note.

advancement, with interest on money, or with rents and profits of land, from the date of the gift to the death of the ancestor. But on the other hand, he is chargeable with the value at the date of the gift, although the property before the ancestor's death has greatly diminished in value, or even perished altogether; and interest may be charged on an advancement from the ancestor's death to the time of division or distribution. See *Puryear v. Cabell*, 24 Grat., 260; *Cabell v. Puryear*, 27 Id., 902; *Barrett v. Morris*, 33 Id. 273; *West v. Jones*, 85 Va., 616; *Kyle v. Conrad*, 25 W. Va., 760; 1 Am. & Eng. Ency. Law (2nd ed.), 783.

§ 172. **Has the Person Advanced His Election to Come into Hotchpot?**—Undoubtedly, but if he does not come in, he is debarred from claiming any part of the property of which the ancestor died seised or possessed; he must allow the other heirs or distributees to take it all. It is, therefore, a *question of calculation* in order to decide whether the child advanced should come into hotchpot, or let well enough alone, and stay out. If, for example, a man dies leaving three sons, and an estate worth \$50,000, and the eldest son has been advanced \$10,000, he would come in, and thereby get \$10,000 more. But if the advancement was \$20,000, and the residue of the estate only \$10,000, if the eldest son came in he would lose \$10,000. In such a case, therefore, he would choose not to come into hotchpot. 1 Am. & Eng. Ency. Law (2nd ed.), 785, note 7.

CHAPTER X.

REMAINDERS.

§ 173. **Definition of Remainder.**—"A remainder is a residue of an estate in land, depending upon a particular estate, and created together with the same." 2 Tho. Co. (126). In order that there may be a remainder, there must be a particular estate upon which it may depend; hence, a freehold to commence *in futuro* is no remainder, and is void at common law. But by "residue" it is not meant that every remainder must be of *all* the estate or interest of the feoffor remaining in him after parting with the particular estate; for any number of remainders for years, for life, or in tail, may be created, and yet the feoffor retain the reversion in fee simple. By the words "created together with the same" a remainder is distinguished from the grant of a reversion. For if A, seised in fee, conveys land to B for life, and *afterwards* grants the fee simple to C, this is not the creation of a remainder in C, but the assignment to him of the reversion. See 1 Bl. Com. (164), (175); Wms. R. P. (17th ed.) 386; 2 Min. Ins. (4th ed.) 390-'94; Fearn on Remainders, (3), note (c).

§ 174. **The Two Kinds of Remainders.**—Remainders are either vested or contingent. Blackstone thus defines them: "Vested remainders (or remainders *executed*, whereby a present interest passes to the party, though to be enjoyed *in futuro*) are, where the estate is invariably fixed, to remain to a determinate person after the particular estate is spent. . . . Contingent or *executory* remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect, either to a dubious and uncertain *person*, or upon a dubious and uncertain event." 2 Bl. Com.

(168-'69). These definitions are believed to be accurate, unless, in the definition of a vested remainder, by the words "where the estate is invariably fixed," it is intended that a vested remainder cannot be limited to be defeated by a condition subsequent. That a vested remainder may be thus defeated, see Gray, *Rule against Perpetuities*, § 102. It must be remembered that a remainder contingent in its creation may, by after event, become vested prior to the time of its taking effect in possession; and that if the remainder be less than the fee simple, it may expire by limitation during the continuance of the particular estate. So that in considering a remainder we must assume that it still exists as a remainder, and we must judge of its character as vested or contingent under the facts as they were at the moment that the question arises. Bearing this in mind, a vested remainder may be defined as follows: A remainder is vested when it is subject to no condition precedent, and is always ready, during its continuance, to come into the possession of a certain person, already existing and ascertained, on the determination of the particular estate, now or hereafter, in any manner whatsoever. And any remainder not so ready is contingent.¹

¹ DEFINITION OF VESTED AND CONTINGENT REMAINDERS.—See in substantial accord with the above definition of a vested remainder, 20 Am. & Eng. Ency. Law, 838; Gray, *Rule against Perpetuities*, §§ 101-108; 2 Min. Ins. (4th ed.) 396. It will be observed that the definition requires that the remainderman, at the time the question arises, should *already* be in existence and ascertained; and it is not enough, in order to consider the remainder *now* vested, that he will become ascertained at the moment the particular estate ends and the possession becomes vacant. Thus there are cases where the same event that ends the particular estate ascertains the remainderman; and whenever the possession becomes vacant there will *then* be a certain person ready to take possession; as in the limitation, To A for the life of B, remainder to the heirs of B, or To A and B for life, remainder to the survivor and his heirs. Here the remainder will vest and come into possession *eo instanti* on the death of B in the one case, or the survivorship of A or B in the other; but meanwhile it remains con-

§ 175. **The Three Great Rules for Remainders.**—It is important to remember that remainders proper are governed by the rigid rules of the common law, which are based on feudal principles. No estate of freehold could be created except by a livery of seisin, a ceremony corresponding to the feudal investiture, and intended to give publicity to the transfer of land. And the seisin could never be *in abeyance*, for the law was jealous that there should always be a tenant of the freehold to whom the lord might have recourse for rents and services. Hence originated these rules as to the seisin, which

tingent, because, as yet, there is no “determinate person” in whom “the estate is invariably fixed”; for *nemo est hæres viventis*, and who can now tell whether A or B will be the survivor? A test suggested by Prof. J. Randolph Tucker will clearly show that these remainders are contingent, viz.: Is the remainderman a person to whom you could give livery of seisin *now*, if his estate were *present* and not future? How could livery be made to the *heirs* of B while B is living, or to the *survivor* of A and B while both are alive? And see Tiedeman, Real Prop., § 397, note 2, where it is said that a reliable test of a vested remainder is “the present capacity [of the grantor] to convey an absolute title to the remainderman.” See *Chapman v. Chapman*, 90 Va. 410.

For the reasons above stated, Fearn’s test of a vested remainder, viz.: “The present capacity of taking effect in possession, if the possession were to become vacant” (Fearn, 216), is open to exception in omitting to add, after “taking effect in possession,” the words “of an already existing and ascertained person”; but the whole tenor of his discussion of remainders shows that this was intended. And the same criticism may be made on the definition of Williams, (though it is believed to be a verbal inaccuracy only): “If any estate, be it ever so small, is always ready, from its commencement to its end, to come into possession the moment the prior estates, be they what they may, happen to determine, it is then a *vested remainder*,” meaning, no doubt, “ready to come into the possession” of a person already in existence and ascertained. Wms. R. P. (17th ed.) 397.

In 20 Am. & Eng. Ency. Law (1st ed.), p. 841 the importance of adding to the definition of a vested remainder the requisite that, at the time of inquiry, the remainderman shall be already in existence and ascertained is thus stated: “The fact that the remainder from the very instant of its creation is capable of

underlie the whole doctrine of remainders (Wms. R. P. (17th ed.) 416):

(1). On the creation of any estate of *freehold*, whether in possession or in remainder, the *seisin* must pass out of the feoffor.

(2). The *seisin* must always have a home; *i. e.*, there

taking effect in possession or enjoyment at any moment the possession or enjoyment may become vacant by the determination of the particular estate does not, as is frequently asserted, necessarily show that it is vested; nor yet is it quite accurate to say that 'when it is certain that the remainder may take effect in possession on the determination of the preceding estates of freehold at whatever time and however early and by whatever means these estates may determine' (1 Preston, Estates, 79), the remainder must be considered as vested. Thus if an estate be limited to two for life, remainder to the survivor of them in fee, the remainder is contingent, for until one of them die, it is uncertain which will be the survivor (Fearne, Cont. Rem. 9), or if land be limited to A for life, remainder to 'such of his children as shall be living at his decease,' each child has but a contingent remainder during A's life, since until his death it is impossible to tell which of the children will answer the description; and yet inasmuch as under both these limitations the person or persons who are to take are ascertained immediately on the determination of the particular estate, the remainders may well be said to be capable of taking effect in possession or enjoyment at any moment the possession or enjoyment may become vacant by the death of the life tenant, and may even be said to be certain to take effect on that event, unless the remainderman predecease the life tenant." Another example of what is a contingent remainder, but which, by the language of the definition of Fearne and Williams, might seem vested is, To A for life, remainder to the heirs of A, supposing the rule in Shelley's Case abolished, and that the particular estate can end only by the death of the tenant for life, and not by his forfeiture in his lifetime. But see as to this example, *Moore v. Littell*, 41 N. Y. 66, and § ———, *infra*, note; *Croxall v. Shererd*, 5 Wall. 263, 283.

In 20 Am. & Eng. Ency. Law, p. 840, this definition is given of a contingent remainder: "A remainder is contingent when it is so limited as to take effect to a person not *in esse*, or not ascertained, or upon an event which may never happen, or may not happen until after the determination of the particular estate." It

must always be a tenant of the freehold in whom the seisin may vest and reside.

(3). If at any time the seisin happens to be left without a home, it immediately returns to the feoffor from whom it passed out. And in that case all limitations dependent on the seisin are annulled and destroyed. All the rules usually laid down as governing remainders are corollaries of (*i. e.*, deducible from) the three rules above given.

§ 176. Rules for Remainders Deduced from the Three Great Rules.

(1). A *contingent* remainder of freehold must vest, if at all, during the continuance of the particular estate, or *eo instanti* (at the very instant) that it determines (ends). This is because the *seisin must have a home*. Thus, let a feoffment be made by the lord (say X), "To A for life, remainder to the heirs of B." Now, suppose A dies before B. Then at A's death the seisin is without a home, as A can no

should be borne in mind, however, that the courts favor the vesting of estates, and will not hold remainders to be contingent if it is possible to consider them as vested. And for this reason, as is said by Tiedeman (Real Prop., § 401, note 2): "Very often a remainder will be construed to be a vested estate upon a condition subsequent, liable to be divested by the happening of the contingency, rather than declare it to be a contingent remainder," as it would be if the condition were precedent. See Gray, Rule against Perpetuities, §§ 102-106; also *Moore v. Littell*, 41 N. Y. 66; *Kelso v. Lorillard*, 85 N. Y. 177; *Avery v. Everett*, 110 N. Y. 317; *Thaw v. Ritchie*, 136 U. S. 519.

For cases in which the court was called on to decide as to the character of a remainder whether vested or contingent, see *Wallace v. Minor*, 86 Va. 550 (*quære* as to the Rule in Shelley's Case); *Gish v. Moormaw*, 89 Va. 345; *Robinson v. Robinson*, *Ib.*, 916; *Chapman v. Chapman*, 90 Va. 409; *Crews v. Hatcher*, 91 Va. 378; *Wilson v. White*, 109 N. Y. 59; *McArthur v. Scott*, 113 U. S. 340, 378; *Miller v. Texas, etc., R. Co.*, 132 U. S. 662; *Tham v. Ritchie*, 136 U. S. 519; *In re Deighton's Settled Estates*, 2 Ch. D. 783; *Cunliffe v. Brancker*, 3 Ch. D. 393.

longer hold it, and the heirs of B, who is alive, have no existence; *nemo est hæres viventis*. Hence the seisin returns to X, the feoffor, and the limitation to the heirs of B is annulled and destroyed. In other words, the remainder to the heirs of B is *contingent*; and as it does not vest during A's life, nor at the moment A dies, it can never vest at all, and so fails altogether. 2 Bl. Com. (Cooley), 168 n. (6).

(2). A *contingent* remainder of *freehold* requires a particular estate of *freehold* to support it. This is because the seisin must pass out of the feoffor, and must be able to find a home when it goes out. Thus, "To A for life, remainder to the heirs of B." Here the contingent remainder to the heirs of B is *well limited*, because the seisin finds a home in A, the tenant of the particular estate, who has a freehold, and so can take and hold the seisin. But if the limitation were "To A for *ten years*, remainder to the heirs of B," the remainder would be void *ab initio*; for there is no home provided for the seisin. A cannot hold it, for his estate is not *freehold*; B cannot take it, because it is not given to him, but to his heirs; and the heirs of B cannot take it, because while B lives his heirs are not in existence. Hence the seisin, for want of a home elsewhere, returns to the feoffor; and so the remainder to the heirs of B never takes effect. The remainder to the heirs of B was a *contingent* remainder of freehold (in fee-simple indeed), and did not have a freehold support, as the rule requires. *Cunliffe v. Brancker*, 3 Ch. D. 393, 399.

(3). A *vested* remainder of freehold does not require a freehold support; *i. e.*, it need not be preceded by a freehold particular estate. Thus, "To A for ten years, remainder to B and his heirs." Here B's remainder is vested, and well limited. The remainder is to B in fee-simple (the word heirs being a word of limitation), and nothing is given to the heirs of B. In this case the seisin is received by A as the tenant in possession, but it immediately enures, or passes to B by virtue of his having the freehold. B is a certain living

person in whom the seisin can vest and reside, and the remainder is well limited.

(4). A contingent remainder *not of freehold* does not require a freehold support. Thus, "To A for ten years, remainder to the heirs of B for twenty years." The contingent remainder to the heirs of B is well limited. For the remainder is not *freehold*, and the seisin does not need to pass out of the feoffor; and so it does not need to find a home in either A or the heirs of B, and the remainder is good because it is not dependent on the seisin.

§ 177. Examples of Vested Remainders.

(1). To A for life, and after A's decease, remainder to B and his heirs. *Doe v. Considine*, 6 Wall. 458.

(2). To A and the heirs of his body, remainder to B and his heirs.

(3). To A for life, remainder to B for life, remainder to C for life, remainder to D for life, etc., remainder to Z for life. Here *all* the life estates in the remainder are *vested*. It may be thought that Z has a very slight chance to outlive all of the preceding life tenants, and take possession of the land. This is true, but a remainder is none the less *vested*, because the chances are against its ever taking effect in possession. For, in referring to the definition of a vested remainder (§ 1741, *supra*), we see that Z is a *certain* person, ready to take possession of the land if the possession should become vacant in any way whatsoever, as by the death or forfeiture of all the preceding life tenants. It is true Z may die first of all, and so would never take possession; but Z's death ends his life estate, and there is no further question as to its being vested or contingent. While Z lives, however, *i. e.*, during the continuance of his estate, the remainder to him is always ready to come into the possession of a certain person, to-wit: Z, if the possession should become vacant, and *this* makes the remainder to Z a *vested* remainder. *Crews v. Hatcher*, 91 Va. 378.

§ 178. **Fearne's Four Classes of Contingent Remainders.**—

Fearne defines a contingent remainder (p. 3) as a remainder limited so as to depend on an event or condition which may *never* happen to be performed, or which may not happen or be performed until *after the determination* of the preceding estate. He then distributes remainders into these four classes:

(1). When the remainder depends entirely upon the contingent determination (*i. e.*, uncertain ending) of the particular estate itself. Here the particular estate may end in either one of several ways, but the remainder is to take effect in possession if the particular estate ends in *one* of these ways, and not if it ends in any other. The remainder is therefore contingent, because it is not ready to come into the possession of a certain person when the particular estate ends *in any way whatsoever*, as is required by the definition given above. For example: "To A until B returns from Rome; and on B's return, to C and his heirs." Here A's estate has a *double* limitation, and is to end on A's death or B's return, whichever happens first. But C is to take on B's *return*, and not on A's death. Meanwhile A's estate is liable at any time to end in either of two ways, and yet C cannot take in *whatever* way it ends. It may end by A's death, and then C takes nothing. Hence by definition above, C's remainder is *contingent*. Fearne (5), n. (d).

(2). When some uncertain event, unconnected with and collateral to the determination of the preceding particular estate, is by the nature of the limitation to precede the remainder. For example: "To A for life, and if C dies before A, remainder to B and his heirs." Here B cannot take unless C dies before A, and yet C's death does not affect the particular estate of A. This is what is meant by calling the event "unconnected with and collateral to the determination (ending) of the particular estate."

(3). When a remainder is limited to take effect upon an event which *must* happen some time or other, but which

may not happen until after the determination of the particular estate. For example: "To A for life, and after C's death, remainder to B and his heirs." Here C's death is a condition precedent to B's taking. C must die, but he may not die until after A dies, *i. e.*, until after the ending of the particular estate. Hence, if the particular estate should end now by A's death in the lifetime of C, B's remainder would not be ready to come into possession, and therefore is contingent. And on the death of A, living C, B's remainder fails.

(4). When a remainder is limited to a person not in being, or not ascertained. For example: "To A for life, remainder to the heirs of B"; *or*, "To A for life, remainder to the first (as yet unborn) son of B, and the heirs of the body of such son."

The following example is a curiosity as containing all of Fearne's four classes of contingent remainders: To A *until B returns from Rome*, and after the return of B and C from Rome, and the *death of D*, to the *first unborn son* of A and the heirs of his body. See Fearne on Rem., p. (9), note (g).

§ 179. Remainders which Do or Do not Come Under Fearne's Third Class.

(1). To A for twenty-one years, if he shall so long live; and after A's death, remainder to B and his heirs. Here A must die, but he may not die during the term of twenty-one years. The remainder is, therefore, *contingent* under Fearne's third class, and being *freehold*, is void for want of a particular estate of *freehold* to support it. Fearne (8).

(2). To A for ninety-nine years, if he shall so long live; and after A's death, remainder to B and his heirs. Here it is considered that A cannot live ninety-nine years, and that his death must occur during that term, when B will take. Hence there is *no contingency*, and B's remainder does not come under Fearne's third class, but is *vested*. And being vested, it is well limited, as a vested remainder of freehold does not require a freehold to support it. But it must not be supposed that A has a *freehold particular estate*. That

remains a mere term of years, but the *remainder becomes vested*, and so does not need the prop of a preceding freehold. Fearne (20), n. (i).

(3). To A for nine hundred and ninety-nine years, if he so long lives; and after A's death remainder to the *heirs* of B. This remainder is contingent under Fearne's fourth class (though not under the third), and being freehold, is void for want of a freehold support.

The courts have not settled how long a term makes the remainder to a certain person vested or contingent, in cases like the first and second examples above. It must depend on circumstances. But it has been held that twenty-one years makes a remainder contingent, while eighty or ninety years makes it vested. See Fearne (20).

§ 180. **The Doctrine of Abeyance of the Fee Simple.**—Blackstone declares (2 Bl. Com. 107) that the *remainder* must pass out of the feoffor at the same time with the creation of a particular estate. Now, conceding this to be true, if we take the example, "To A for life, remainder to the heirs of B," there must be an abeyance of the fee-simple until after the death of A or B. For the rule above requires the remainder (which is in fee) *to pass out of the feoffor*. But where can it go? Not to A, for his estate is for *life* only, and we are speaking of the *fee simple*. Not to B, for he takes nothing at all; and not to the heirs of B, for B is *living*, and his heirs are non-existent. Hence, as under the rule above the fee simple was declared "out," and as nobody knew its "whereabouts," it was said to be *in abeyance*—a confession of ignorance sometimes covered by Latin, declaring that the fee simple was *in nubibus* (in the clouds), or *in gremio legis* (in the bosom of the law). See *Wallach v. Van Riswick*, 92 U. S. 202, 212; *Illinois, etc., R. Co. v. Bosworth*, 133 U. S. 92, 100.

The abeyance continues during the *joint lives* of A and B, and ends on the death of *either*. For on B's death before A, the fee simple would pass to the heirs of B, now ascertained by B's death (eldest son, *e. g.*). On the other hand, if A died

before B, the remainder would fail for want of a home for the seisin, as it would not vest *eo instanti* the particular estate ended. The remainder failing, the fee simple returns to the feoffor, and this ends its abeyance.

§ 181. **Fearne's View of Abeyance.**—Fearne denies the universality of Blackstone's rule, and holds that a remainder continues in the *feoffor* until it has some one else to go to. Hence, in the example above, the fee simple never *leaves the feoffor* until by B's death, living A, it can vest in the heirs of B. If A dies first, the remainder fails, and the fee simple never leaves the feoffor at all. See Fearne (361); Wms. R. P. (413); 2 Bl. Com. (Sharswood) 107, note 4; *Bigley v. Watson*, (Tenn.) 38 L. R. A. 679.

§ 182. **Additional Rules for Remainders.**

(1). A remainder must always have the support of a particular estate in possession. Hence, a freehold to commence *in futuro* is no remainder, and is void at common law. For example: "To A for life from and after the first day of January." 2 Tho. Co. (348) n. (T).

(2). A remainder must always await the regular expiration of the particular estate; it cannot take effect in derogation of (*i. e.*, by cutting short) the particular estate. For example: "To A (a widow) for life: provided, however, that if A marries again, her estate for life is to come at once to an end, and the land to go to B and his heirs." Here the limitation over to B after A's estate on condition is void as a remainder at common law; but it is allowed in a *devise*, or in a deed by way of *use*, when it is called a *conditional limitation*.

(3). After a fee simple no remainder can be limited. For example: "To A and his heirs, remainder to B and his heirs"; or, "To A and his heirs, but on B's marriage, remainder to B and his heirs." B's estate is void as a remainder in both examples. Another form of the rule is that there can be "no fee on a fee," or, "a fee cannot be mounted on a fee."

(4). A remainder must never be separated from its particular estate. For example: "To A for life, and after A's death *and one week*, remainder to B and his heirs." B's remainder is void; and on A's death, the seisin returns at once to the feoffor for want of any other home. (Wms. R. P. (17th ed.) 417.)

§ 183. **Contingency with a Double Aspect.**—This is an *apparent* exception to the general rule that there cannot be a fee on a fee, although in reality it does not come within that rule. It is the name given to two fee simple contingent remainders *in the alternative*, where the second remainder in fee takes effect *in lieu* of the first, and only in case the first never takes effect at all. Even the *vesting* of the first fee utterly destroys the second. For example: "To A for life; and if A shall have a son born to him, then to such son and his heirs; but if A have no son, then to B and his heirs." If A has a son, the remainder to such son vests, and destroys B's estate. If A never has a son, then at A's death B's remainder vests, and comes into possession. B cannot be said to take a fee *after* or *on* a preceding fee; for B only takes in case the fee to A's son *never vests*. B's fee is then a *substitute* for that limited to the unborn son of A, but is not on it or after it. See Fearne Rem. 373; *Cooper v. Hepburn*, 15 Grat. 558; *Walker v. Lewis*, 90 Va. 578.

§ 184. **Cross Remainders.**—A cross remainder is where lands are given to two or more with reciprocal limitations of the lands of each to the other. For example: "Deed to A of Blackacre for life, and to B of Whiteacre for life, with cross remainders between them." This is a short way of saying what, written out in full, is as follows: Deed of Blackacre to A for life, remainder to B for life; of Whiteacre to B for life, remainder to A for life. So there are two estates in both Blackacre and Whiteacre, one in possession, the other in remainder. A and B both have two estates, but only one in each piece of land. But as each has a remainder after the

death of the other in that other's land, these remainders are called cross remainders.

But though there may be two separate estates held in severalty, the most common case of cross-remainders is where land is held by several tenants in common, there being, of course, undivided possession. The same rules apply as if the shares were held in severalty, and each remainder was separate and independent. For example: Grant of Blackacre "To A and B and the heirs of their bodies, to hold as tenants in common, with cross-remainders, remainder to C and his heirs." Here on death of A or B, and failure of issue, his part goes to the other, and finally, on failure of the heirs of the body of the survivor, the estate goes to C. 1 Prest. Est. (105).

The obvious design and intention of such a limitation is that upon the share of one of the takers failing for want of heirs of the body, instead of its reverting to the original owner, or going at once to the final remainder-man, it shall go to the tenant of the other part of the estate, and the entire estate go over together on the final failure of issue of both, and not in parcels on the failure of issue of each.

This reciprocal right of each to a remainder in the part of the other, expectant upon the determination of the particular estate of that other in such part, whether for life or in tail, is, when the particular estates are for life, somewhat similar to the right of survivorship between joint-tenants. But notice that survivorship, even of a fee simple, takes place at once on the *death* of either tenant; but where the particular estate upon which cross-remainders depend is an estate-tail, the remainder must await the determination of the estate-tail. And one joint-tenant can defeat survivorship by alienation; but the cross remainder is a subsisting vested right, not liable to be destroyed. Such remainders also resemble an estate held by several in coparcenary, who are heirs to each other, as three sisters in England. On the death of one, her share descends to the other two, and so on. But one coparcener can defeat such descent by alienation, and it only applies to estates of inheritance.

Cross remainders may be limited by deed or by will. But in a deed there must be *express* words, whereas in a will they are often *implied* in favor of the intent. They may be between two or more. And in a will it seems the law favors cross remainder between *two*, but not between a greater number. 2 Bl. Com. (381).

Cross remainders are more readily implied between members of a class than between strangers, *e. g.*, more readily between the *children* of A, than between A, B and C. 17 Ves. 64; 3 Hare 1. Thus in *Powell v. Howells*, L. R. 3 Q. B. 654, a testatrix devised land unto and between her three nephews, W., T. and D., in equal shares, and the heirs of their bodies respectively lawfully begotten, and in default of such issue *of any of them*, unto M. P. and her heirs. *Held*, that cross remainders were created by implication between W., T. and D., and that the words *of any of them* must be construed of *all of them*. See also *Tebbs v. Duval*, 17 Grat. 349; Cowper, 31, 717, 797; 1 Atk. 579; *Taffe v. Conmee*, 19 Ho. of Lds. Cas. 64; *Atkinson v. Holtby*, Ib. 313.

§ 185. **Destruction at Common Law of Contingent Remainders.**—For full discussion see 17 Am. St. R. 839–843, note. A contingent remainder at common law was liable to be *destroyed* (*i. e.*, to come to a sudden and violent end) in several ways. Thus, take the example: “To A for life, remainder to the first unborn son of A and the heirs of his body, remainder to D and his heirs.” Here the contingent remainder to A’s unborn son would be destroyed either by a *forfeiture* incurred by A, or by the *merger* of A’s life estate in the fee-simple.

For suppose A forfeits before any son is born to him, or even begotten. Then A can no longer hold the seisin, and it goes to D, the vested remainderman, and this leaves the contingent remainder without a particular estate to support it (without a prop), and so it is at once destroyed. And if, *after the forfeiture*, a son is born to A, such son can never take the estate, because the remainder was not ready to vest *eo in-*

stanti that the particular estate determined. 2 Bl. Com. (171).

Again, suppose that before the birth of a son to A, D *releases* to A the fee simple. Then A's life estate would become *merged* in the fee simple, the rule being that when a larger and a smaller estate meet in one and the same person, by two different conveyances, *without any intervening vested estate*, the smaller is at once merged into, or swallowed up by, the larger. *Garland v. Pamplin*, 32 Grat. 315; *Little v. Bowen*, 76 Va. 724; 1 Va. Law Reg. 453, note by Judge Burks. Applying this rule, A's life estate is merged in the fee, and A has the fee simple in possession, which destroys the remainder to A's son (unborn), as no remainder is allowed after a fee simple. And as the remainder to A's unborn son is *contingent*, its intervention could not prevent the merger, but merger takes place in spite of it, and to its destruction. Wms. R. P. (426).

And, finally, suppose A *surrenders* his life estate to D, before A's son is born. Here again, under the rule, merger takes place, and D has at once the entire fee-simple. A's life estate no longer exists, and the remainder to A's unborn son is destroyed at once for lack of a freehold support. For what constitutes a surrender, see *Beall v. White*, 94 U. S. 382; *Edwards v. Hale*, 37 W. Va. 193.

§ 186. **Mode at Common Law of Preserving a Contingent Remainder from Destruction.**—This was by the interposition of trustees to protect the contingent remainder. The form of limitation was as follows: "To A for life, remainder to B and C, trustees, for life of A, remainder to the first unborn son of A and the heirs of his body, remainder to D and his heirs." Now, suppose A forfeits before he has a son, the seisin finds home in B and C, the trustees; and if A has a son afterwards, the remainder to the son can then vest. Thus, while forfeiture is not *prevented*, its effect upon the contingent remainder is avoided. Again, suppose A surrenders to D, or D releases to A, no merger can now take place, and of course the re-

mainder to A's unborn son is unaffected. For the trustees have a vested right interposed between the estates of A and D, and the larger and smaller estates (those of D and A) cannot get together. 2 Bl. Com. (172; Wms. R. P. (17th ed.) 428).

§ 187. **Rule of Perpetuities for Contingent Remainders.**—The rule is thus laid down: "No estate in land can be given to an unborn person for life, followed by any estate to the child of such unborn person." In such case the estate of the unborn person's child is *void*, as violating the Rule against Perpetuities. See Wms. R. P. (17th ed.), 470-'71. For example: "To A for life, remainder to B (first unborn son of A) for life, remainder to C (first unborn son of B) for life." Here A is living, and his life estate supports the contingent remainders to both B and C, but the Rule against Perpetuities pronounces C's estate void; not because it violates any rule to the seisin, but because it is *against public policy*. For if the law permitted a succession of life estates to the children of unborn children *in infinitum*, it would create a virtual entail, not barable by a common recovery; and the land might thus be tied up for generations. For example: "To A for life, remainder to B (unborn son of A) for life, remainder to C (unborn son of B) for life, remainder to D (unborn son of C) for life, remainder to E (unborn son of D) for life," etc. Now all these remainders are well limited, and, if on A's death he has a son B, B can take the seisin, and, if on B's death he has a son C, C can take the seisin, and so on down indefinitely, until A's issue fails. To prevent this devolution of life estates, the law draws a line *after the first unborn son*, and annuls the remainders to all the rest, thus *in effect* permitting alienation in fee-simple to be postponed during lives in being, and twenty-one years thereafter, but no longer. Wms. R. P. (420), (469); 3 Jarman, Wills, §11.

§ 188. **The Cy Pres Doctrine as to Contingent Remainders.**—This is a rule by which when a *testator* has violated the Rule against Perpetuities, his intention is allowed effect *as far as (cy pres)* is consistent with the rules of law. Thus,

in a devise "To A for life, remainder to B, (the unborn son of A), for life, remainder to C, (the unborn son of B,) and the heirs of C's body," the remainder to C is void; and striking it out would leave, "To A for life, remainder to B for life." But by the *cy pres* doctrine, as the testator has shown a purpose to *tie up* the land, the law, in favor of his intention, changes the estate to B, the unborn son of A, from a *life* estate to an *estate-tail*, so that the limitation becomes finally, "To A for life, remainder to B *and the heirs of his body*." Wms. R. P. (17th ed.) 471; *Hampton v. Holmon*, 5 Ch. D. 183.

N. B.—The *cy pres* doctrine is not applied (1) unless the estate to C, the unborn son of the unborn son, is an *estate tail*; and (2) unless the case occurs in a *devise*. Then the estate-tail given to C, which is void as to him, is transferred to B, taking the place of the *life estate* given him by the testator. 20 Am. & Eng. Ency. Law, 867.

§ 189. **Contingent Remainders Descendible and Devisable.**—In Fearn, Remainders (364), it is said: "Another observation is, that a contingent remainder of inheritance is transmissible to the heirs of the person to whom it is limited, if such person chance to die before the contingency happens. But, of course, this will not be the case if the existence of the remainder man, at some particular time, enters into and forms part of the contingency itself upon which his interest is to take effect. Thus, if a limitation be to children who shall attain a certain age, or shall survive a given period or event, the death of any child pending the contingency has the effect of striking the name of such child out of the class of presumptive objects; but when the contingency on which the vesting depends is a collateral event, irrespective of attainment to a given age, or surviving a given period, the death of any child pending the contingency works no exclusion, but simply substitutes and lets in his heir-at-law. See 2 Jarman, Wills (860), where the doctrine is thus laid down as to contingent interests in per-

sonalty, but it is equally applicable to contingent interests in land. And see *Medley v. Medley*, 81 Va. 265, where the same doctrine is laid down as to executory devises, which are said to stand, as respects transmissibility, on the same footing as contingent remainders.

As to the *devisability* of contingent remainders, Williams says: "A contingent remainder was also devisable by will under the old statutes, and is so under the present Wills Act (1 Vict., c. 26, § 3)." Wms. R. P. 423. Such remainder is undoubtedly devisable in Virginia. See Code Va., § 2512, authorizing a devise of any estate to which a person shall be "entitled at his death, and which, if not so disposed of, would devolve upon his heirs." That the person to whom a contingent interest is limited may be said to be "entitled" at his death, see *Medley v. Medley*, 81 Va. 265, 273. And see Code of Va., § 2418, declaring that "any interest in or claim to real estate may be disposed of by deed or *by will*." See Wms. R. P. (17th ed.) 423; 2 Min. Ins. (4th ed.) 421.

§ 190. **Assignment of Contingent Remainders.**—At common law the doctrine was that a contingent remainder was inalienable at law, and not grantable by deed. It could, however, be passed by fine, or released for the benefit of the reversion; and in equity an assignment for a valuable consideration was recognized and enforced. See Fearn, Remainders, (365-'66); Wms. R. P. (17th ed.), 422. But now, in England, contingent interests may be conveyed by deed (8 and 9 Vict. c. 106, § 6); and so in Virginia, by Code, § 2418, enacting that "any interest in or claim to real estate may be disposed of *by deed* or *by will*."¹

¹ INALIENABILITY OF CONTINGENT REMAINDERS AT COMMON LAW.—In Williams, Real Property, (17th ed.) 423, it is said: "The circumstance of a contingent remainder having been so long inalienable at law, was a curious relic of the ancient feudal system. This system, the foundation of our jurisprudence as to landed property, was strongly opposed to alienation. Its policy was to

§ 191. Sale of Contingent Interests Under Decree of Court.

—By statute in Virginia, provision is made for the sale of contingent interests under decree of a court of chancery. See Code Va., § 2432, which enacts as follows: “When any estate, real or personal, is given by deed or will to any person, subject to a limitation contingent upon the dying of any person without heir, or heirs of the body, or issue of the body, or children, or offspring, or descendant, or other relative [see Code, § 2422], it shall be lawful for the circuit or corporation courts, upon a bill filed by the person holding the estate subject to such limitation, in which bill all persons then living and contingently interested shall be made defendants, to decree a sale of such estate, real or personal, and to invest the proceeds of sale under the decree of the court, for the use and benefit of the person so holding the estate, subject to the limitations of the deed or will creating

unite the lord and tenant by ties of mutual interest and affection; and nothing could so effectually defeat this end as a constant change in the parties sustaining that relation. The proper method, therefore, of explaining our laws, is not to set out with the notion that every subject of property may be aliened at pleasure; and then to endeavor to explain why certain kinds of property cannot be aliened, or can be aliened only in some modified manner. The law itself began in another way. When, and in that manner, different kinds of property gradually became subject to different modes of alienation, is the matter to be explained; and this explanation we have endeavored, in proceeding, as far as possible to give. But as to such interests as remained inalienable, the reason for their being so was that they had not been altered but remained as they were. The statute of *Quia Emptores* (18 Edw. I., c. 1), expressly permitted the alienation of lands and tenements—an alienation which usage had already authorized; and ever since this statute, the ownership of an estate in land (an estate tail excepted) has involved in it an undoubted power of conferring on another person the same, or, perhaps more strictly, a similar estate. But a contingent remainder is no estate; it is merely the chance of having one, and the reason why it so long remained inalienable at law was simply because it had never been thought worth while to make it alienable.”

the estate; *provided, however*, that the bill of the plaintiff shall set forth the facts which, in his opinion, would justify the sale of the said estate, to be verified by the affidavit of the party." For further procedure, see §§ 2433-'35. And by § 2436: "The decree rendered in such suit shall be as binding on all persons who may be born thereafter, and become interested in the said estate, in like manner, and to the like extent, as it is upon the parties to the suit." See 2 Min. Ins. (4th ed.), 422; *Faulkner v. Davis*, 18 Grat. 651; *Troth v. Robertson*, 78 Va. 46. *Knotts v. Stearns*, 91 U. S. 638; *Miller v. Texas, &c. R. Co.*, 132 U. S. 662. And see Acts 1897-'98, c. 358, p. 404, authorizing the sale by decree of court of "an estate, real or personal, given by deed or will to any person for his life, or the life of another, with *vested* remainder to another, whether the remainderman be an infant or adult." And see Code Va., § 2616, *et seq.* providing for the sale by a court of chancery of the estate of minors and insane persons, "whether the estate of the minor or insane person, or of any of the persons interested, be absolute or limited, and whether there be or be not limited thereon any other estate, vested or contingent." As to a sale in a suit for partition, see *Carneal v. Lynch*, 91 Va. 114; C. V. § 2562.

§ 192. **Words of Limitation and Words of Purchase.**—A *purchaser*, in the technical sense of the term, is one who acquires real estate *otherwise than by descent*, as, for example, by deed or devise. And *words of purchase* are those which describe the person or persons named in a deed or devise to whom the estate is given, and in whom it attaches or commences. Words of purchase are *descriptio personarum*, and designate the grantees in a deed, or the objects of a testator's bounty in a devise. On the other hand, words of limitation serve only to limit or define the *estate* or degree of interest conferred on those who are designated by the words of purchase. Thus, in a deed "To A and his heirs," "A" is the word of purchase, and "heirs" is a word of limi-

tation, whereby A's estate is made a fee simple. But in a deed, "to A for life, remainder to the heirs of B," the word "heirs" is a word of purchase, because it is descriptive of those who are to take the land on A's death. Yet in a deed "To A for life, remainder to the heirs of A," the word "heirs" is a word of limitation, and not of purchase, as we shall see in the next section. In the language of Fearné (79): "When the words "heirs," etc., operate only to *expand* an estate in the *ancestor*, so as to let the heirs described into its extent, and entitle them to take *derivatively* through or from him as he root of succession, or person in whom the estate is considered as commencing, they are properly words of limitation; but when they operate only to give the estate imported by them to the heirs described *originally*, and as the persons in whom that estate is considered as *commencing*, and not derivatively from or through the ancestor, they are properly words of purchase."

§ 193. **The Rule in Shelley's Case.**—This is by way of exception to Fearné's Fourth Class of contingent remainders, and its effect is that in the limitation, "To A for life, remainder to the heirs of A," the heirs of A do not take a remainder at all, either vested or contingent, but the word "heirs" serves as a word of limitation to give A the fee simple. The Rule in Shelley's Case is as follows. Whenever the ancestor by any gift or conveyance takes *an estate of freehold* in lands or tenements, and in the *same* gift or conveyance an estate is afterwards limited by way of remainder, either mediately or immediately, to his *heirs* or *the heirs of his body*, the words "heirs" or "heirs of his body" are words of *limitation* of the estate, carrying the inheritance to the *ancestor* in fee simple or fee tail, and not words of purchase creating a contingent remainder in the *heirs* or *heirs of the body*. An example of the *immediate* operation of the rule is given above, where "To A for life, remainder the heirs of A," gives A the fee simple. So "To A for life, remainder to the heirs of the body of A," gives

A a fee tail. The rule operates *mediately* in the examples, "To A for life, remainder to B for life, remainder to the heirs of A," or "To A for life, remainder to B for life, remainder to the heirs of the body of A," and A takes in the one case a fee simple, and in the other a fee tail, subject, however, to the intermediate life estate vested in B. Shelley's Case, 1 Co. 93; 2 Tho. Co. (143); 2 Min. Ins. (4th ed.) 400; 11 Am. St. R. 100, note; 45 Id. 194, note.

§ 194. **The Five Requisites to the Operation of the Rule in Shelley's Case.**—See *Chippis v. Hall*, 23 W. Va. 504, 513.

(1). There must be an estate of *freehold* in the *ancestor*, or, as he is sometimes loosely called, the *first taker*.

(2). The ancestor must take the estate of freehold by or in consequence of the *same conveyance* which contains the limitation as to his heirs.

(3). The word "heirs" must be used in its *technical sense*, as importing a class of persons to take *indefinitely in succession*. Hargrave, 1 Law Tracts, 575. See *De Vaughn v. Hutchinson*, 165 U. S. 566, 578, where it is said: "The word 'heirs,' in order to be a word of limitation, must include all the persons in all generations belonging to the class designated by the law as 'heirs.'"

(4). The interests limited to the ancestor and to his heirs must be of the *same quality*, *i. e.*, both legal or both equitable; for otherwise they could not coalesce to form one estate in the ancestor. *Green v. Green*, 23 Wall. 486; 2 Va. Law. Reg. 39.

(5). The estate limited to the "heirs" or "heirs of the body," must be limited *by way of remainder*. Fearne, *Remainders*, (276); 2 Min. Ins. (4th ed.) 437; *Hawthorne v. Beckwith*, 89 Va. 786.¹

¹ RATIONALE OF THE RULE IN SHELLEY'S CASE.—Fearne thus explains (*Contingent Remainders*, 200) the principle upon which the limitation, after a life estate to the ancestor, of a remainder to his heirs or heirs of the body, in the *technical* sense, gives the

§ 195. **Origin of the Rule in Shelley's Case.**—On this subject there are various theories. See Tied. R. P. § 433, and notes; 22 Am. & Eng. Ency. Law, 494, note; 2 Bl. Com. (Sharswood's Ed.) (173), note 12; 2 Bl. Com. (Cooley's Ed.) (172), note 11. Some of the theories are as follows:

(1). That the rule is of feudal origin, and was introduced

inheritance to the ancestor and nothing to the heirs, etc., unless by descent from him as *pars antecessoris*:

"If the testator meant, according to the terms of the proposition, that the person who should take after the tenant for life should be any person indiscriminately answering the description of heir, etc., of such first taker, and entitled only in respect of such description; and that all other persons successively succeeding to the same description should *eo nomine*, and by virtue only of such relation to the ancestor, equally succeed to the estate; it follows that he could not have any particular object of attention among all this unknown class of successors, much less any preference of any one of them to that stock or source from which his bounty reaches them only by emanation, as it were.

"The disposition, in its progress to heirs, etc., at large, is only a modified extension of the gift to the ancestor, the immediate and sole known object of the testator's favor, in relation to whom alone the eventual ulterior takers can bring themselves within the track of his notice. What ground have we, then, to ascribe to the testator any impulse of distinction among such equally unascertained accessory objects of his view? What pretence for inferring any such preference of any one individual of them to the rest, and even to the ancestor himself, as to intrust that one with the power of defeating the succession to all the rest while it is denied to their common ancestor? . . .

"The law imposes the dilemma of committing such power either to the ancestor or to his next heir; will any reasonable inference of the testator's intention in the matter induce the preference of an unknown derivative character, accidentally meeting the terms of a general description, to the original attractive object, the ground work of the testator's bounty, and to which the attendant relative designations seem mere appendages? If not, there is no more apparent violence offered to the testator's presumable intention by vesting the inheritance in the ancestor than in his first heir, whenever that heir is not distinguished from the rest, but all heirs of the description used appear to be equally in his contemplation."

to prevent fraud upon tenure; for if the heir had been held to take by *purchase*, he would not, upon the death of the ancestor, have been liable to the burdens imposed upon a *descent*, and the lord would have been prejudiced by the loss of relief, wardship, marriage, and other fruits of tenure.

(2). That the rule was intended to benefit the heir by giving his *ancestor* an estate of inheritance (to which the heir would be entitled by descent), instead of giving the *heir himself a contingent remainder*, liable to destruction by forfeiture or by merger.

(3). That the rule was intended to prevent the *abeyance* of the fee simple.

(4). That the rule was intended to facilitate the alienation of land, by giving the ancestor a fee simple, instead of a life estate with a contingent remainder to his heirs.

(5). That the rule was introduced prior to the time at which a *contingent remainder* was allowed by law, and so was intended to favor the ancestor and heir both, by giving the ancestor an estate of inheritance which would descend to the heir, instead of giving the ancestor a life estate only, and the heir nothing either by purchase or by descent. Wms. R. P. (17th ed.) 411, note (e); Gray, Rule against Perpetuities, § 100.¹

¹ In Williams, Real Property (17th ed.), 398, this explanation is offered of the Rule in Shelley's Case: "We have seen that, according to the feudal law, the grantee of an hereditary fief was considered as being entitled during personal enjoyment only, that is, for his life, while his heir was regarded as having been endowed with a substantial interest in the land. And these conceptions seem to have been imported into the English law along with the principle of tenure. In early times after the Conquest, therefore, if a grant of land was made to a man and his heirs, his heirs, on his death, became entitled; and it was not in the power of the ancestor to prevent the descent of the estate accordingly. He could not sell it without the consent of his lord; much less could he then devise it by his will. The ownership of a fee simple was then but little more advantageous than the possession of a life interest at the present day. . . . A tenant

§ 196. **The Inflexible Character of the Rule in Shelley's Case.**—It is a *rule of law*, and if the five requisites above laid down are present, its operation is not prevented even by *express words* in the deed or will declaring that it *shall not operate*. In other language, the requisites being present, the Rule in Shelley's Case will not yield to the *intention*, however plainly expressed, but will operate, though the intention (even in a will) be manifestly defeated. Thus in the great case of *Perrin v. Blake*, 4 Burr. (2579), the testator declared his intention to be that his son should not sell or dispose of his estate *for longer than his life*; and *to that intent* he devised the same to his son for life, and after his death, to the heirs of the body of the said son. The Court of King's Bench held that the son only took an estate *for his life*, but this decision was reversed by the Court of Exchequer Chamber; and it is now well settled that the son took an *estate tail* by the Rule in Shelley's Case, notwithstanding the testator's manifest intention to the contrary. For all the *requisites* for the operation of the rule are present, a *freehold* in the ancestor (testator's son), and by the *same conveyance* an estate given to *the heirs of the body* of the ancestor (the son) by way of *remainder*; and the words, "heirs of the body," are used in their *technical sense*, as importing a class of persons to take *indefinitely in succession*, and both estates, viz.: that to the son and that to the heirs of the body, are of the same *quality*, both being legal. Under these circumstances, the rule *must* operate, and the estates to the ancestor

in fee simple was accordingly a person who held to him and his heirs; that is, the land was given to him to hold for his life, and to his heirs to hold after his decease. It cannot, therefore, be wondered at that a gift expressly in these terms, 'To A for his life, and after his decease to his heirs,' should have been anciently regarded as identical with a gift, 'To A and his heirs,' that is, a gift in fee simple. Nor if such was the law formerly, can it be a matter of surprise that the same rule should have continued to prevail up to the present time. Such, indeed, has been the case."

and to his heirs *must coalesce* and give the ancestor an estate of inheritance, just as when fire is applied to powder an *explosion* must follow, in spite of an intention to the contrary. Hence, the rule is sometimes spoken of as *tyrannical*.¹

§ 197. **How can the Operation of the Rule in Shelley's Case be Prevented?**—In the absence of statute, the rule must operate if all the requisites are present. To prevent its operation, therefore, in drawing a deed or will, the limitation

¹ EFFECT OF THE RULE IN SHELLEY'S CASE AS A RULE OF LAW.—In *Allen v. Craft* (Indiana), 58 Am. Rep. 417, 433, it is said: "There, is, therefore, no escape from the force of the rule in *Shelley's* case, when the word 'heirs' [other requisites being present] is used in its strict legal sense as a word of limitation. But the word 'heirs' is not in every case a word of limitation, for it may be employed in a different sense. It has seemed to many that there is a conflict between the rule declaring that the intention of the testator must govern, and the rule in *Shelley's* case; but the appearance of conflict fades away when it is brought clearly to mind that when the word 'heirs' is used as a word of limitation, it is treated as conclusively expressing the intention of the testator. Where it appears that the word was so used, the law inexorably fixes the force and meaning of the instrument. If once it is granted that the word was used in its strict legal sense, nothing can avert the operation of the rule in *Shelley's* case. So the inquiry is, Was the word used as one of limitation? . . . It is because the word 'heirs' is not used in its legal sense that the courts do not apply the rule in *Shelley's* case; for when it is so used the rule must be applied." And see 11 Am. St. R. 100-107, note; 20 Id. 909; 45 Id. 186.

In a notice of the recent English case of *Van Grutten v. Foxwell* [1897], A. C. 658, it is said in a note by Sir Frederick Pollock, in the *Law Quarterly Review* (London), January, 1898, p. 1: "The rule stands firm, notwithstanding strenuous assault, as a rule of law which is quite independent of the settlor's intention. If a testator said in so many words, 'The rule in *Shelley's* case shall not apply to any limitations contained in this my will,' it [*i. e.*, the testator's declaration of intention] would be merely inoperative. There may be cases where 'heirs,' or like words, are clearly shown by the immediate context to have an unusual sense,

must be so expressed as not to contain *all* the requisites; for if any one requisite is absent, the rule is powerless. Thus the deed or will might be so drawn as to make the ancestor take the *legal title*, while the estate of the heirs is made *equitable*, or *vice versa*; or the freehold to the ancestor might be given by *deed* in the testator's lifetime, and the estate to the *heirs* be given afterwards by a *will*, so that the ancestor and the heirs would take by *different* conveyances. Another method would be not to use the word "heirs" in its *technical* sense, as importing a "class of persons to take indefinitely in succession," but in a limited and restricted sense, as embracing *less* than the *whole* line of heirs in *indefinite* succession, and

which makes them words of designation and not of limitation. Such cases do not form an exception to the rule, for when a distinct special meaning, ascertained by the special context, is clear to the court, and is read in place of the words so qualified, there is nothing to which the rule could apply."

In some of the American States the rule in *Shelley's* case is treated not as a rule of law, but as a legal rule of construction, and so liable to yield to the intention of the testator, apparent on the face of the will, that the rule shall not apply. Thus in *Wescott v. Buford* (Iowa), 74 N. W. Rep. 18, it was held that when the testator devised land to A for life, remainder to his heirs, the rule did not apply: and that A took only a life estate. Commenting on this decision, it is said in 12 Harvard Law Review (May, 1898), p. 64: "The court rests its decision on the ground that a strict application of the rule in *Shelley's* case would defeat the intention of the testator as to the life estate to A. As was conclusively shown in *Van Grutten v. Foxwell* [1897] A. C. 658, the rule in *Shelley's* case is not a rule of construction, but an absolute rule of property. Its object, it may be said, is to defeat the intentions of the testator when they run counter to it. Rules of construction may be employed to discover what he meant by the word 'heirs.' If it means a particular class, the rule does not apply. If it means heirs in a general sense, as it did in the principal case, the rule should be applied, notwithstanding the intention of the testator. The harshness of the rule, which influenced the decision in the principal case, while it may be a good reason for its abolition, furnishes no excuse for construing it into something which it is not."

son or persons shall take the said land under that description as being confined to such persons only as should answer that description *at a designated time*; as *e. g.*, at the time of the ancestor's death. Thus in *Taylor v. Cleary*, 29 Grat. 448, a deed made in 1821 conveyed land "To A for and during his life only, and after A's death the said land to go to such person or persons as should *at that time* answer the description of heir or heirs-at-law of the said A; and such person or persons as purchasers, under and by virtue of this deed, and not by inheritance as the heirs of said A"; and it was held that A took but a life estate in the land, and that the persons who *at the time of A's death* answered the description of A's heirs took as *purchasers* under the deed. The ground of the decision was not the *intention* of the grantor as manifested by saying, "To A for and during his life only," and by saying that the heirs should take the land as *purchasers*; but the ground was that the word "heirs" was not used in its *technical* sense, and so one of the requisites for the operation of the rule was not present. For a case similar to *Taylor v. Cleary*, see *Earnhart v. Earnhart*, 127 Ind. 397 (22 Am. St. Rep. 652). And see *Daniel v. Whartenby*, 17 Wall. 639; *De Vaughn v. Hutchinson*, 165 U. S. 566; *Stokes v. Van Wyck*, 83 Va. 724; *Wallace v. Minor*, 86 Va. 550 (criticised by Judge Burks in 2 Va. Law Reg., p. 28); *Nye v. Lovitt*, 92 Va. 710; *Nichols v. Gladden* (N. C.), 23 S. E. 459; 53 Am. Dec. 474, note.

§ 198. **Status of the Rule in Shelley's Case in the United States.**—The rule has been abolished in many of the States, but it is still in force in others. See *Polk v. Faris*, 9 Yerger (Tenn.), 209 (30 Am. Dec. 400, and note 415-'17); Hawkins on Wills (2d Am. ed.), 184, n. 2. In Virginia the rule is now supposed to be totally abolished, but it died hard, and the first attempt to kill it only "scotched the snake." The Virginia legislation is given in the next section.

§ 199. Virginia Statutes Intended to Abolish the Rule in Shelley's Case.

(1). *First statute.* By statute taking effect July 1, 1850, it was enacted: "Where any estate, real or personal, is given by deed or will to any person for his life, and after his death to his heirs or the heirs of his body, the conveyance shall be construed to vest an estate *for life only* in such person, and a remainder in fee simple in his heirs or the heirs of his body." Code, 1849, ch. 116, § 11. But this attempt to abolish the rule was ineffectual in *two cases*, and in them the rule still applied, as is shown below under (a) and (b).

(a). The language of the statute is, "Where any estate . . . is given by deed or will to any person *for his life*." Now suppose the limitation is, "To A for the life of B, remainder to the heirs of A." This is not to A for *his* life, but to A *for the life of another* (*pur autre vie*), and the case is not within the statute, and so the rule operated as at common law, giving A the fee simple.

(b). Again the statute declares: "The conveyance shall be construed to vest an estate for life only in such persons, and a remainder in fee simple in his heirs or the heirs of his body." But suppose no remainder can vest in the "heirs or heirs of the body"; then does the ancestor take only a life estate, and the heirs or heirs of the body *nothing*, or does the rule operate as at common law and give the ancestor a fee simple, or a fee tail, as the case may be? It was held that the statute did not apply, and that the rule still operated in any case in which the remainder for any reason *could not actually vest* in the heirs, or heirs of his body. Thus in *Hood v. Haden*, 82 Va. 588, there was a power of appointment conferred on X to devise land to A, but not to the *issue* of A. X devised the land "To A for life, and after A's death, remainder to the issue of A" ("issue" in a will being equivalent to "heirs of the body"). Now under the power X can appoint *lawfully* to A only, and the appointment to A's

issue as purchasers, to take in their own right under the devise, is *void*, and so no remainder can, as the statute directs, vest in the issue of A. Then what estate shall A take? *Held*, that as the statute could not perform its *double purpose* of giving the issue a *remainder*, as well as conferring on A a life estate, it had no application *at all* to such a case, and so the Rule in Shelley's Case gave A a fee tail, as it would have done before the statute was passed.

(2). *Second statute*. By statute taking effect May 1, 1888, drawn by Judge E. C. Burks, it is now enacted as follows (C. V., § 2423): "Wherever any person, by deed, will or other writing, takes an estate of freehold in land, or takes such an estate in personal property as would be an estate of freehold if it were an estate in land, and in the same deed, will, or other writing, an estate is afterwards limited by way of remainder, either mediately or immediately, to his heirs, or the heirs of his body, or his issue, the words "heirs," "heirs of his body," and "issue," or other words of like import used in the deed, will, or writing, in the limitation therein by way of remainder, *shall not be construed as words of limitation*, carrying to such person the inheritance as to the land, or the absolute estate as to the personal property, but they *shall be construed as words of purchase, creating a remainder* in the heirs, heirs of the body or issue."¹

By this statute it is thought that the Rule in Shelley's Case is at last entirely abrogated in Virginia. See 2 Va. Law. Reg., 38, where it is said in a note by Judge Burks: "That rule [in Shelley's Case] was not abolished [in Virginia] until the Code of 1849, and then not completely. It is believed that the abrogation is completed by § 2423 of the present Code."

¹ REMAINDER TO HEIRS, HEIRS OF THE BODY, OR ISSUE.—The question arises under the statute abolishing the rule in Shelley's case, as to the nature of the remainder, whether vested or contingent, which is created by the statute in the heirs, heirs of the body, or issue, as purchasers. As to the heirs and heirs of the body, it would seem clear that by the definition of a vested remainder

§ 200. Interpretation of the Words "Heirs," "Heirs of the Body," "Issue," and "Children."

(1). "*Heirs.*" The technical meaning of the word "heirs" imports a "class of persons to take indefinitely in succession," and this is the primary sense of the word in both wills and deeds. It is therefore a word of *limitation*, and not a word of *purchase*. And the same is true of the words, *heirs of the body*. But if *the intention* be manifest

heretofore given (*ante*, § — and note), the remainder to them is contingent, and cannot vest in them until they are ascertained by the death of the ancestor. And see this view taken in Gray, Rule against Perpetuities, § 107; Tiedeman, Real Prop., § 433, n. 1 on p. 346. But in *Moore v. Littell*, 41 N. Y., 66, it was held that since the abrogation of the rule in Shelley's case, a grant "To A for life, and after his decease, to his heirs and their assigns forever," gave to the children of A a vested interest in the land, though liable to open and let in after-born children of A; and liable also, in respect to the interest of any child, to be wholly defeated by his death before his father, thus treating the condition of survivorship as subsequent instead of precedent. From this conclusion, three of the justices dissented; and if tenable, it must be by reason of the statutory definition of remainders in New York, assuming it to change the doctrine of the common law, and on the supposition that there was no ground of forfeiture by which A's estate might end in his lifetime.

By the New York Revised Statutes, under which *Moore v. Littell* was decided, it is declared: "Future estates are either vested or contingent. They are vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate. They are contingent whilst the person to whom, or the event upon which, they are limited to take effect remains uncertain." Commenting on this statute, Prof. Gray says (Rule against Perpetuities, § 107): "It is doubtful whether this piece of legislative definition was intended to change the common law; but the courts [of New York] have decided, and it would seem, correctly, that it has done so. And it would seem that the adoption of this view necessitates the decisions of the Court of Appeals, which at first appear rather startling, that since the abolition of the rule in Shelley's case, a remainder to heirs after a life estate to the ancestor is vested." On the other hand, Prof. Tiedeman

not to use the word "heirs" in its technical sense, but in the sense of "certain persons answering that description at a certain time" (*i. e.*, less than the *whole* line of heirs),

(Real Prop., § 433, note 1) says: "This remarkable decision is altogether inconsistent with the rules of the law of remainders, and even with the New York statutory definition of a contingent remainder, viz., that they are contingent 'whilst the person to whom, or the event upon which, they are limited to take effect remains uncertain.'"

It may be observed that the Virginia Code of 1849, ch. 116, § 11, in abolishing the Rule in Shelley's Case, declared, "the conveyance shall be construed to *vest* an estate for life only in such person, and a remainder in fee simple in his heirs or the heirs of his body"; and upon the word "vest," it has been thought that the statute negatived a contingent remainder. But the Code of 1887 declares that the words "heirs," "heirs of the body," or "issue," shall be construed as words of purchase, *creating* a remainder in the heirs, heirs of the body, or issue.

As to the remainder to the "issue," the view is taken in 2 Min. Ins. (4th ed.) 463, that when *issue* is a word of purchase, it is equivalent to *heirs of the body*; and that as no one can be heir to a living person, a remainder to the issue of A is for that reason contingent until the death of A. But the question there under consideration was the effect in Virginia since July 1, 1850, of the limitation, "To A for life, and if he die without issue, to B," in which the *implied* remainder in favor of the issue of A is made contingent by the statute of 1820, by which the implication is confined to "issue living at the time of his death, or born to him within ten months thereafter." (See *Va. Law Journal*, April, 1880, article entitled "*Dying without Issue under Virginia Statutes*"). And it is believed that the maxim *nemo est hæres viventis* has no application to the word *issue*; and that an estate can vest in the issue of a living person, unless the language of the will shows a contrary intention. It may also be remarked that *issue living at the death* of a person may include a much larger class of objects than *heirs of the body*. Issue when a word of *limitation* is equivalent to heirs of the body, but not when it is a word of *purchase*. 2 Jarm. Wills (5th Am. ed.), chaps 28 and 29; 2 Redfield Wills, part II., chap. 1; Hawkins on Wills (2nd Am. ed.), 87, 191, 197; 11 Am. and Eng. Ency. Law, 869; *Cook v. Cook*, 2 Vern., 545; *In re Watson's Trusts*, L. R., 10 Eq., 36; *Weldon v. Hoyland*, 4 De G. F. and J., 564; *Hobgen v. Neale*, L. R., 11 Eq., 48.

it then ceases to be a word of limitation, and becomes a word of purchase, denoting those who are *to take for themselves* under the deed or will. In *Taylor v. Cleary*, 29 Grat. 448, this use of the word "heirs" prevented the operation of the Rule in *Shelley's Case* in a deed made in Virginia in 1821, as has been already explained. And see *Norris v. Johnston*, 17 Grat. 8; *Stokes v. Van Wyck*, 83 Va. 724; *Wallace v. Minor*, 86 Va. 550; *Robinson v. Robinson*, 89 Va. 916; *Buford v. North Roanoke, &c., Co.*, 90 Va. 418; *Nye v. Lovitt*, 92 Va. 710; *Reid v. Stuart*, 13 W. Va. 338, 347; *Milhollen v. Rice*, *Ib.* 510; *Stuart v. Stuart*, 18 W. Va. 675; *Hinton v. Milburn*, 23 W. Va. 166; *Hard v. Ashley*, 117 N. Y. 606; Hawkins on Wills, 182; 2 Jarman, Wills (5th Am. ed.), 585; 22 Am. & Eng. Ency. Law, 522 and note.

(2). "*Issue.*" The word "issue" in a *deed* is not a word of *limitation*. Hence, at common law, a deed "To A and his issue," gives A a *life estate* only. 2 Bl. Com. (115); Wms. R. P. (17th ed.), 177, 292; 11 Am. & Eng. Ency. Law, 869. At common law, if A has no issue at the date of the deed, he takes a *life estate*, and after-born issue nothing; if A has issue then living, he and the issue take jointly. 11 Am. & Eng. Ency. Law, 876, n. 1. See *Bradford v. Griffin* (S. C.), 19 S. E. 76. Issue as a word of purchase means all of a man's descendants, as of a certain time. As to the time at which issue are to be ascertained, see p. 222, note 1. But in a *will* issue is *prima facie* equivalent to "heirs of the body," and therefore is a word of limitation. Hence a devise "To A and his issue," gives to A an *estate-tail*. So a devise "To A for life, and after his decease, remainder to his issue," gives A an *estate-tail* by the Rule in *Shelley's Case*; issue being a word of limitation and not a word of purchase. But though in a will "issue" is *prima facie* a word of limitation, yet this presumption will be rebutted if there is anything on the face of the will to show that by the word "issue" the *whole* line of descendants in indefinite suc-

cession was not intended, but only *certain* descendants, as children only, or children and grandchildren only, or such descendants only as may exist at a particular time, as, for example, at a certain person's death. See *Doe v. Collis*, 4 T. R. 294; *Ralph v. Carrick*, 11 Ch. Div. 873; *In re Warren's Trusts*, 26 Id. 208; *Slater v. Daingerfield*, 15 M. & W. 263; *Atkinson v. McCormick*, 76 Va. 791; *Robinson v. Robinson*, 89 Va. 916; 32 Am. St. R. 736; 45 Id. 194; Hawkins on Wills, 191; 11 Am. & Eng. Ency Law, 877; 1 L. C. R. P. 97. An example of "issue" used as a word of purchase is to be found in *Wine v. Markwood*, 31 Grat. 43, where a devise "To A for life, and if he die without issue, to B and his heirs," was held to give A a life estate only, with a contingent remainder to the issue of A living at his death, or born to him within ten months thereafter, as purchasers. The will bore date in 1856, and the testator dies in 1865.

(3). "*Children.*" The word "children" is *prima facie* a word of purchase when it occurs in a will, and is not the equivalent of "issue" or "heirs of the body." 2 Jarman, Wills, 690; 3 Id. 174; Hawkins, Wills, 80; 5 Am. & Eng. Ency. Law (2d ed.) 1092. Indeed, "children" is not only *prima facie* a word of purchase in a will, but it primarily signifies descendants *of the first degree only*, and does not include grandchildren, unless the intention to do so is manifest on the face of the will, or from the nature of the case; as when the gift is to the children of a person dead at the date of the will, who has left no children, but grandchildren only, which fact was known to the testator. Hawkins, Wills, 84; 2 Jarman, Wills, 690; *In re Smith*, 35 Ch. D. 558. If, therefore, there be a devise to the children of A, and there are both children and grandchildren of A, the children only of A take, and the grandchildren are excluded. See *Pickersgill v. Rodgers*, 5 Ch. D. 163; *In re Hopkins' Trusts*, 9 Id. 131; *Miles v. Jarvis*, 24 Id. 633; *Matter of Patten*, 111 N. Y. 480; *Smith v. Chapman*, 1 H.

& M. 290; *Moon v. Stone*, 19 Grat. 130; 19 Am. St. R. 644; 44 Id. 817; 53 Id. 456.

In a will, however, (but not, it seems, in a *deed*) the *prima facie* meaning of "children," as a word of purchase, may be rebutted; and it may be considered a word of limitation, and equivalent to heirs of the body, provided such construction is required in order to effectuate the manifest intention of the testator. This is true whether the limitation be "To A and his children" (where there are children living at the time of the devise. See rule in *Wild's Case*, *infra*); or "To A for life, remainder to his children" (thus causing the operation of the Rule in *Shelley's Case*); or "To A for life, and if he die without children, to B" (thus denoting an indefinite failure of issue). And in one case the form of limitation, coupled with an extrinsic fact, changes the *prima facie* meaning of "children," and converts it into a word of limitation. This doctrine is known as the rule in *Wild's case*, and is explained in the next section. See *Tyrone v. Waterford*, 1 De G. F. & J. 613; *Byng v. Byng*, 10 H. of L. Cas. 170; 5 Am. & Eng. Ency. Law (2d ed.), 1093; 11 Id. (1st ed.) 902; 22 Id. 516; 2 Washburn R. P. 560; Tiedeman, R. P., § 434. As to the meaning of the word "family" (usually equivalent to children), see *Phillips v. Ferguson*, 85 Va. 509; *Stuart v. Stuart*, 18 W. Va. 675.¹

¹ THE WORD "CHILDREN" IN A DEVISE.—(1). *Bastards*. It is well settled in England, that when "children" is a word of purchase, it means *prima facie* legitimate children only, and bastards are excluded. And this construction will be adhered to unless from the context of the will, or the circumstances of the case (as when there are only illegitimate children), it is manifest that it would defeat the intention of the testator. *Hill v. Crook*, L. R., 6 H. L. 265; *Eagleton v. Horner*, 37 Ch. D. 695; *In Goods of Ashton* (1892), P. 83; Hawkins, Wills, 80; 2 Jarman, Wills, 786. And the doctrine is the same in the United States generally. 5 Am. & Eng. Ency. Law, 1096. But in Virginia it is held in *Bennett v. Toler*, 15 Grat. 588, that upon a devise to a daughter for life, and at her death the property to be equally divided among her children, an illegitimate child of the daughter will take with her

§ 201. **The Rule in Wild's Case.**—This is an ancient rule of the common law, by which, under certain circumstances, the word “children” becomes a word of limitation, and equivalent to “*heirs of the body*.” The rule in Wild's Case (6 Co. 17) is as follows: If in a devise there be a limita-

legitimate children. But this decision is placed on the ground that the Virginia law of descents, declaring that “bastards shall be capable of inheriting and transmitting inheritance on the part of their mother, as if lawfully begotten” (Code, § 2552), has changed the general rule by giving the bastard a *mother*, and making him *one of her children*; and as he is capable of taking by descent as her child, he is also embraced under a will by the words “her children.” The court says (p. 631): “And so, adhering to the principle of the rule, where the law makes the bastard child of a woman her child, endows him with every attribute of a child born in wedlock, includes him in the very class designated as children to whom her estate is to pass in the event of her dying intestate; a testator speaking of ‘her children,’ the words must be construed to include in the class all who in law are her children.” Moncure, J., dissented.

(2). *After-born Children.* Whether, when there is a devise to children as purchasers, those born after the death of the testator are entitled to take as embraced in the class, depends upon whether the gift to the children is *immediate* or *postponed*. Thus, if the gift be immediate, as if there be a devise to A and his children, and A has children at the death of the testator, and others are born subsequently, only the children in being at his death (including a child *en ventre sa mere*) are entitled; and after-born children are excluded. But this construction is *prima facie* only, and will yield to the intention; and it is rebutted if the testator devises “To A and his children, born or to be born” (*Woodruff v. Pleasants*, 81 Va. 37), or uses any expressions from which the intent to include after-born children can be inferred. See *Buford v. Land Co.*, 90 Va. 418, a case of a deed; 2 Devlin, Deeds, § 864. But, on the other hand, if the gift to the children be *postponed*, as when the devise is “to A for life, and after his death to the children of B,” then the rule is that the word “children” includes any child born before the termination of the life estate of A, although not in being at the death of the testator. Here the remainder vests at once in the children living at the death of the testator, but will open and let in all children of B born after that time, but before the death of A.

tion "*To A and his children*," and at the time of the devise A has children, A and his children take jointly as purchasers; but if at the time of the devise *A has no children*, then the word *children* is a word of *limitation* whereby A takes an estate tail, and not a word of *purchase* whereby the children take jointly with A. But in order that A may take an estate tail by the operation of this rule, these requisites must concur: (a) The limitation must be in a devise; (b) The form of the limitation must be, "*To A and his children*," *not to A for life, remainder to his children*; and (c) A must have *no children at the time of the devise*. If all these requisites do not concur, the word "children" is not a word of limitation, and so cannot enlarge the estate of A to a fee-tail. But when these requisites do concur, the primary sense of the word "children," which is issue of the first generation, is displaced by the rule in Wild's Case, and "children" becomes equivalent to "issue," as embracing all descendants to take indefinitely in succession. See *Moon*

Hamletts v. Hamlett, 12 Leigh, 350; *Cooper v. Hepburn*, 15 Grat. 551. But any children of B born after A's death will be excluded. And in this case the words "born or to be born," applied to the children of A, will not alter the construction, because these words are taken to refer to children born between the death of the testator and the death of A. See 2 Jarman, Wills, 700-742; Hawkins, Wills, 68-80; 29 Am. & Eng. Ency. Law, 410-414. And the rule as to the time at which the number of objects is to be ascertained is the same as to all classes of relations, brothers, nephews, cousins, etc., including *issue* when it is a word of purchase. 2 Jarman, Wills, 703; Hawkins, Wills, 72. See p. 221, *supra*.

In the above statement of the law as to immediate and future gifts to children, it has been assumed that there were one or more children living at the death of the testator or at the death of the life tenant. But as to immediate gifts, if there be no child *in esse* at the death of the testator, the gift will embrace all the children who may be born afterwards by way of executory bequest or devise. And the same rule is applicable to a future gift, when not subject to the common law rule as to the time of vesting of contingent remainders. 2 Jarman, Wills, 721, 725. See Code Va., § 2424, cited, *infra*.

v. *Stone*, 19 Grat. 130; *Byng v. Byng*, 10 H. of L. Cases 121; *Clifford v. Roe*, 5 App. Cases 447; *Smith v. Fox*, 82 Va. 763; *East v. Garrett*, 84 Va. 523. And in *Clifford v. Roe*, *supra*, it is said that the rule in Wild's case, if only a rule of construction (and not a rule of law, like the Rule in Shelley's Case), is not now to be departed from, unless the *context* of the will excludes the operation of the rule. The expression "time of the devise," seems to refer to the *date* of the will, although it has been argued that it ought to have reference to the state of things (*i. e.*, the existence or non-existence of children) at the *death of the testator*, and not at the time *when the will was made*. See 3 Jarm. Wills, 174; 2 Min. Ins. (4th ed.) pp. 84, 85; Hawkins on Wills, 198; 11 Am. & Eng. Ency. Law, 879, n. 1.¹

¹TIME OF THE DEVISE UNDER THE RULE IN WILD'S CASE.—In 11 Am. & Eng. Ency. Law, p. 884, note, it is said: "Under the rule in Wild's Case, 6 Co. 16 b, 17 a, the existence of issue or children at the time the devise or bequest takes effect, and not merely at the time it is made, is important as affecting the construction of the instrument. Such is not the literal language of all the cases, but since the impossibility of giving the children or issue an estate jointly with their ancestor is the main reason for giving the ancestor an estate tail, and as this impossibility does not exist if there are children or issue living at the time of the testator's death, whatever might have been the case at the date of the will, the existence or non-existence of [children] or issue at the death of the testator, if the gift be immediate, would seem to be the important point. . . . But in *Goodright v. Wright*, 1 Strange, 25, 32, and *Lyon v. Mitchell*, 1 Madd. 467, the limitations were held to create estates tail expressly on the ground that the testator could not be supposed to have any particular affection for the issue, there being none *in esse* at the time of the devise."

It will be observed that in the above extract the rule in Wild's Case is treated as equally applicable whether the devise be, To A and his *children*, or To A and his *issue*; and that in neither case will A take an estate tail if there are children or issue at the "time of the devise." See this view (which the language of Wild's Case would seem to sustain) contended for by the learned author of the article on "Issue," 11 Am. & Eng. Ency. Law, 881, note 1. He admits, however, that "opinions have been entertained that

§ 202. **Doctrine in Virginia as to the Word "Children."**—Suppose there is a devise "To a woman and her children," and that there are children living at the time of the will. Then, by the rule in Wild's Case, "children" is not a word of limitation but a word of purchase, and the children would take jointly with their mother. But in Virginia, in many cases, the court has refused to adopt this construction, and has held, instead, that the mother takes the whole estate, and the children *nothing at all*; the mother taking the fee simple by the statute of 1787 dispensing with words of limitation in order to confer the fee, and the word "children" being neither a word of purchase nor a word of limitation, but a word used to denote *the motive* of the testator in making the devise, viz., to *give all* to the mother, that *she* might have the means to support and educate her children. See *Wallace v. Dold*, 3 Leigh, 258; *Stinson v. Day*, 1 Rob. (Va.) 459; *Mosby v. Paul*, 88 Va. 533, where all the previous cases are collected. And this construction has been adopted in West Virginia. *Wilmoth v. Wilmoth*, 34 W. Va. 426; *Seamonds v. Hodge*, 36 Id. 304. The same doctrine has been held as to *deeds* conveying property in trust for a woman and her children. *Mauzy v. Mauzy*, 79 Va. 537; *Seibel v. Rapp*, 85 Va. 28; *Stace v. Bumgardner*, 89 Va. 418; *Nye v. Lovitt*, 92 Va. 710; *Fackler v. Berry*, 93 Va. 565.¹

in a gift [by will] to A and his *issue*, the word *issue* is always a word of limitation, whether there be any issue or not; and that, therefore, under any circumstances, A takes an estate tail in realty, and an absolute interest in personalty," and it is believed that such is the law, and that the doctrine of Wild's Case is now inapplicable except to a limitation to A and his *children*. See 2 Jarman, Wills (411); Hawkins, Wills, 189, 197; 2 Wms. Exors. 1107.

¹ TO A WOMAN AND HER CHILDREN IN VIRGINIA.—For the general doctrine that a deed or devise "To A and his children," when there are children living at the time of the deed or devise, creates a *joint estate* in A and his children as purchasers, see Freeman, Cot. & Part., § 26, where it is said: "A deed, devise, or bequest to a man and his children, or to a woman and her chil-

§ 203. **Surviving Children.**—When a testator makes a bequest or devise “To A for life, and at A’s death, to *my surviving children*,” and some of the children who survive the testator die before A, the life tenant, dies; the question arises, does the word “surviving” have reference to the death of the testator, or to the death of A? It is now settled in Virginia that it refers to the *death of the testator*, unless the will manifests a contrary intent, and this on the ground that the law favors the *vesting* of estates. *Hansford v. Elliott*, 9 Leigh, 79 (Tucker, P., dissenting); *Martin v.*

dren, without any additional words, must be regarded in the same manner as if made to any other class or number of persons. The grantees, therefore, take as joint tenants.” See also Devlin on Deeds, § 860. And see 2 Va. Law Reg. 39, note, by Judge Burks to *Nye v. Lovitt*, 92 Va. 710, where it is said: “All the Virginia cases on this subject, we believe, are cited by Judge Lewis in *Stace v. Bumgardner*. We invite an examination of each one of them, and we think it safe to say that in no one of them is the decision that the children take no interest rested on the language alone that the gift is ‘to the woman and her children.’ The intention to give exclusively to the woman is deduced from the context, and the language of the instrument taken as a whole. We submit that if the language is ‘to the woman and her children,’ they take—the woman and her children—a joint estate, unless there is some other language in the instrument manifesting the intention that the woman shall take the whole estate and the children nothing.” But see *Mosby v. Paul*, 88 Va. 533, not cited in *Stace v. Bumgardner*, *supra*. And in *Fackler v. Berry*, 93 Va. 565, it is said by Keith, P.: “There is a class of cases beginning with *Wallace v. Dold*, 3 Leigh, 258, and running down to *Mosby v. Paul’s Adm’r*, 88 Va. 533, in all of which the language used is far more apt and proper to create an interest in the children than that upon which we are commenting, but in each of these cases it was held that the mother took a fee simple to the exclusion of any interest whatever in the children, who were named merely as indicating the motive or consideration for the gift.” In all the Virginia cases the limitation has been to a *woman* and her children. *Quære*: would the construction be the same in Virginia if a gift or devise were made to a *man* and his children?

Kirby, 11 Grat. 67; *Stone v. Lewis*, 84 Va. 474; *Sellers v. Reed*, 88 Va. 377; *Gish v. Moomaw*, 89 Va. 347; *Chapman v. Chapman*, 90 Va. 409; *Crews v. Hatcher*, 91 Va. 382; *Stanley v. Stanley*, 92 Va. 534. In England, on the other hand, it is now settled, after great fluctuation, that the word *surviving* in a bequest of personalty, is taken as referring to the *period of distribution*. *Cripps v. Wolcott*, 4 Madd. 11; Hawkins on Wills, 261; 29 Eng. & Am. Ency. Law, 488. In devises of realty, it ought to be referred, if the same rule were applied, to the determination of the prior limitation. But it is said that it must be left to future decisions to tell what is the actual rule of construction applicable in England to this perplexing word in reference to real estate. *Taaffe v. Conmee*, 10 H. of L. Cas. 69, per Westbury, C.; *Winterton v. Crawford*, 1 Russ. & M. 407; 2 Jarm. on Wills, 53; 2 Redf. on Wills, 371, 488; Hawkins on Wills, 262. For a collection of the American cases see 29 Am. & Eng. Ency. Law, 489.

§ 204. Examples of Limitations to Surviving Children in Virginia.

(1). *Hansford v. Elliott*, 9 Leigh, 79 [in effect]: "I bequeath certain personalty to my wife for her life; and at her death to be divided among my surviving children." *Held*, that *surviving* meant surviving the *testator*, and that all the children living at the testator's death took *vested* interests, which were not affected by their death before the wife, but passed to *their* personal representatives.

(2). *Martin v. Kirby*, 11 Grat. 67 [in effect]: "I devise to my wife my land during her widowhood, and at her death I wish it sold and the proceeds divided among my surviving children." *Held*, that children surviving *testator* took *vested* interests at that time.

(3). *Stone v. Lewis*, 84 Va. 474 [in effect]: "I devise my land to my wife for her life, and after her decease I wish it sold, and the proceeds divided among my surviving brothers and sisters." *Held*, the brothers and sisters surviving the *testator* took *vested* interests as of that time.

(4). *Jameson v. Jameson*, 86 Va. 51 [in effect]: "I bequeath personalty to my daughter for her life, and after her death the same to be equally divided amongst her surviving children, and the issue of such as may be dead, such issue taking *per stirpes*, and not *per capita*. Held, that the taking of the *children* is expressly postponed to the death of their mother, and the gift is to such only as *survive her*; but that the gift to the *issue* of such of the children as do not survive the mother is an original gift to such issue, and not by way of substitution, and that to such original gift no condition of survivorship of the life tenant is annexed by the testator. Here it will be seen that as to the children, the general rule was set aside in favor of the intention, and the word "surviving" was held to have reference to the death of the life-tenant (their mother), and not to the death of the testator.

(5). *Cheatham v. Gower* (Va.) 26 S. E. 853 [in effect]: "I devise to my nephew my land for his life, and at his death to his surviving children." Held, following *Jameson v. Jameson*, *supra*, that "surviving" has reference to the death of the nephew, and not to the death of the testatrix, and that such only of the nephew's children were entitled as were living at his death; but that a child surviving the nephew (its father) was entitled to take, although not born until after the death of the testatrix. The general rule was recognized, but the case was made an exception on the ground of intention. Keith, P., dissented. It would seem, however, that the decision is correct, and that there is a material distinction between cases where the testator, after a life estate to A, gives property (1) "To *my* surviving children" (*i. e.*, surviving me, the testator), and (2) "To *his* surviving children" (*i. e.*, surviving A, the life tenant).

§ 205. **Virginia Statutes Altering the Common Law Doctrines Concerning Remainders.**

(1). Livery of seisin is not required in Virginia in order to create a freehold. "All real estate shall, as regards the conveyance of the immediate freehold thereof, be deemed to *lie in*

grant as well as in livery." Code of 1849, ch. 116, § 4, taking effect July 1, 1850. See Code of 1887, § 2417.

(2). Protection of a contingent remainder from destruction by forfeiture or merger. "The alienation of a particular estate on which a remainder depends [*i. e.*, an alienation by a *tortious* conveyance, which worked a *forfeiture* at common law. *Archer's Case*, 1 Co. 63], or the union of such estate with the inheritance by purchase or descent, shall not operate, by merger or otherwise, to defeat, impair, or otherwise affect such remainder." See 1 Rev. Code of 1819, ch. 99, § 20; Code of 1887, § 2425: So that trustees are not needed in Virginia to protect contingent remainders. See 17 Am. St. R. 839, note.

(3). Statute protecting a contingent remainder from failing, although it is not ready to vest during the continuance of the particular estate, or *eo instanti* that it determines. "A contingent remainder *shall in no case fail* for want of a particular estate to support it." Code of 1849, ch. 116, § 12; Code of 1887, § 2424. Thus in the limitation, "To A for life, remainder to the heirs of B," if A dies before B, the remainder to the heirs of B does not fail, but takes effect whenever B dies.¹

¹ PROTECTION OF A CONTINGENT REMAINDER FROM FAILURE.—Upon the construction of the emphatic language of the Virginia statute of 1849 (taking effect July 1, 1850), that "a contingent remainder *shall in no case fail* for want of a particular estate to support it," two points are to be noted:

(1). The statute prevents the *failure* of a *contingent remainder*. It is assumed that there is such a remainder well limited, which, however, is liable to fail (never take effect) for want of a particular estate to support it; as when, subsequently to the creation of the remainder, the particular estate comes to a natural end, or is destroyed (meets with a violent death, *e. g.* by merger), before the remainder is ready to vest. In such case, though the remainder does not vest during the continuance of the particular estate, or *eo instanti* that it determines, the statute saves it from failure, and allows it to take effect afterwards. But in a deed "To A for ten years, remainder to the heirs of B," there is really no contingent remainder, as the limitation to the

heirs of B is void *ab initio* for want of a freehold support. It is not a *contingent remainder* liable to fail for want of a particular estate (of freehold) to support it; but an abortive attempt to create such a remainder, void in its inception, and concerning which, as a nullity, no question of failure arises. Such a limitation, therefore, is not within the meaning of § 2424 of the Code. If it were in a devise, it would be good as an *executory devise* (as to which see hereafter); and it is now validated in a deed by C. V., § 2428, declaring that "any estate which would be good as an executory devise or bequest shall be good if created by deed."

(2). Again, it is to be observed that the statute preserves a contingent remainder from failure "for want of a *particular estate* to support it." But a condition precedent to the vesting, imposed by the grantor, expressly or by construction of law, must be performed before the remainder can vest and take effect. Fearn, as we have seen, defines a contingent remainder as "limited so as to depend on an event or condition which may *never* happen or be performed, or which may not happen or be performed until *after the determination of the particular estate*." It is to the latter case that the statute refers; and the remainder (subject to the rule against perpetuities, as to which see hereafter), is allowed to take effect *on the performance* of the condition precedent, though it is not performed *until after the ending of the particular estate*; so that there is an interval during which there was a "want of a particular estate to support it." Thus, in the limitation: "To A for life, and if B (a bachelor) have a son, then to such son and his heirs," a son of B could take under the statute, though not in being until after the death of A; and so in a deed "To A for life, and after C's death, to B and his heirs," it is presumed, under the statute, that B could take on C's death, though A dies before C. On the other hand, if a deed be made "To A for life, and if C dies under twenty-one, remainder to B and his heirs"; while, by the statute, B could take on the death of C under twenty-one, though after the death of A, yet B would not take if C lived to be over twenty-one. And the same is true when the remainder is contingent on the survivorship of one person by another, or survivorship of a certain time or event. The survivorship *must take place*, though under the statute it may not occur until after the determination of the particular estate. Thus, in a devise "To A for life, remainder to such of the children of A as shall be living at the death of B," only such children of A as survive B can take; but the statute permits them to take if they do survive B, though the death of B does not occur until many years after the death of A.

CHAPTER XI.

EXECUTORY INTERESTS.

§ 206. **Definition.**—Executory interests are divided into two classes: (1) Executory Uses, and (2) Executory Devises. An executory *use* is a limitation valid as a use, but void at common law as a remainder. An executory *devise* is a limitation valid in a will, but void at common law as a remainder. Fearne's celebrated definition of an executory devise is in substance as follows: "Such a limitation of a future estate in lands as the law admits in a *will*, though contrary to the rules of conveyancing at common law." See Fearne, pp. 386, 395.¹

§ 207. **The Sacred Rule as to Executory Interests.**—No limitation in a deed or will shall ever be considered an *executory use*, or an *executory devise*, if it can possibly be good at common law by way of *remainder*. It is said that if there be one rule of law more sacred than another, it is this. The reason is that as executory interests allow modes of limitation contrary to the common law, they are in derogation of it, and so are *construed strictly*. The law favors the old *feudal remainder*, and treats every limitation by way of *use*, or by

¹ DEFINITION OF AN EXECUTORY DEVISE.—In 2 Jarman on Wills (5th Am. ed.), 483, it is said: "An executory devise is a limitation by will of a future estate or interest in land which cannot, consistently with the rules of law, take effect as a remainder; for it is well settled, and indeed has been remarked (as a rule without exception), that when a devise is capable, *according to the state of the objects at the death of the testator*, of taking effect as a remainder, it shall not be construed to be an executory devise."

way of *devise*, as a remainder, whenever *as a remainder* it would be *well limited* at common law. *Purefoy v. Rogers*, 3 Saund. 380, 388; *Fearne*, 394; *Gray*, *Perpetuities*, § 59; 20 Am. & Eng. Ency. Law, 913; 2 Min. Ins. (4th ed.), 431.

§ 208. **How to Recognize Executory Interests.**—The *prima facie* presumption is always in favor of remainders. See the “Sacred Rule” above given. Hence the first thing to be considered, in order to decide whether a given limitation is an executory interest or not, is whether it would or would not be good in *feoffment*, according to the common law rules governing *remainders*. If it *can be* good by way of remainder, then *it is a remainder*, and must stand or fall as such (see *infra*, § 213), and can never be regarded as an executory use or devise, although it may occur in a conveyance to uses or in a devise. But if the limitation would be *void at common law by way of remainder*, then, if it occurs in a conveyance to uses, it is called an *executory use*; and if it occurs in a devise, it is called an *executory devise*.

§ 209. **Practical Test of an Executory Interest.**—Examine the limitation, and decide whether as a *remainder* it is *well limited*. It will not be well limited as a remainder: (1) If by it a freehold is made to commence *in futuro*; or (2) if a fee simple is mounted on a fee simple, or if any limitation follows a fee simple; or (3) if a contingent remainder of freehold lacks a freehold support; or (4) if the limitation over is separated from the particular estate; or (5) if it is limited to take effect in derogation of the particular estate. See *ante*, § 182. Hence, in each of these cases the limitation *cannot* be good by way of *remainder*, and for this very reason it becomes an *executory interest*. 2 Jarm. Wills, 483.

§ 210. **Examples of Executory Uses.**—These occur in a conveyance to uses, and so there must be a *feoffee to use*, and a *cestui que use*.

(1). Deed “To A and his heirs to the use of B and his heirs from and after the marriage of B with F.” Now is

B's estate *good by way of remainder*? Manifestly not, since it is a freehold commencing *in futuro*. Therefore, B's estate cannot be a remainder, and hence it can be and is an *executory use*, being found in a conveyance to uses. It is called a *springing* use, as it springs up and takes effect on a future day.

(2). Deed "To A and his heirs, to the use of C and his heirs until B shall marry F; and from and after such marriage to the use of B and his heirs." Is B's estate good by way of *remainder*? Manifestly not, for it mounts a fee on a fee. Then B's estate cannot be a remainder, and, therefore, it can be and is an executory use, being found in a conveyance to uses. It is called a *shifting* use, as it shifts, on B's marriage, from C to B.

N. B. A use is called *springing* when it limits a freehold to commence *in futuro*; a use is called *shifting* when it mounts a fee on a fee. See (1) and (2) *supra*.¹

¹ SPRINGING AND SHIFTING USES.—In 20 Am. & Eng. Ency. of Law, 909, these definitions are given: "Interests in realty created by such limitations, [*i. e.*, "future interests in land which would be invalid if made in an assurance at common law"] are called executory interests, and may be divided into springing and shifting uses, and executory devises. A springing interest is an interest limited by way of use or devise to take effect at a future time independently of, without being supported by, and without affecting, any prior interest of the measure of freehold created by the same instrument. A shifting interest is an interest so limited as to arise in derogation or defeasance of another interest of the measure of freehold created by a preceding limitation. If created by way of use, these interests are called springing and shifting uses; if by will, springing and shifting devises, or more commonly executory devises indiscriminately. Conditional limitation is a common term for shifting uses and shifting executory devises, as well as the limitations by which they are created. A contingent use, strictly speaking, is a remainder limited by way of use, but the term is used loosely to designate all future uses, and sometimes even to distinguish springing and shifting uses from those limited by way of remainder." In Gray, Perpetuities, § 54, it is said: "When a use or devise takes effect on the determi-

(3). Deed to A and his heirs to the use of B for twenty-one years; remainder to the use of the first unborn son of B, and the heirs of his body. Is the estate of B's unborn son good by way of *remainder*? Manifestly not, for it is a *contingent* remainder of *freehold* without any *freehold* support. Therefore, the estate to B's unborn son cannot be a *remainder*, and hence it can be and is an *executory use*. Gray, Perpetuities, § 58; 1 Am. & Eng. Ency. Law, 927, note.

(4). Deed to A and his heirs to the use of B for life, and after B's death *and one week*, to the use of C and his heirs. Is C's estate good by way of remainder? Manifestly not, for there is a gap between it and the particular estate. Then, as it *cannot* be a remainder, it can be and is an *executory use*. For an example of a limitation over taking effect in derogation of the particular estate, see *infra*, § 212.

It will be remembered that in each of the above examples, A is feoffee to uses, and stands *seised* to the use, and is called the *reservoir* of *seisin*. The uses are executed, as they arise, by the Statute of Uses, he who has the *use* being deemed in lawful *seisin* and possession, *i. e.*, to have the *legal title*.

§ 211. **Examples of Executory Devises.**—These do not require the aid of *uses*, but they must be found in a *devise*, and then are permitted by way of *indulgence* to testators.

(1). Devise to B and his heirs from and after his marriage with F. Is B's estate good by way of remainder? Manifestly not, because it is a freehold to commence *in futuro*. Therefore B's estate cannot be a remainder; and hence it can be and is an *executory devise*, being found in a *will*. Compare this example with a *springing use*.

nation of preceding estates created at the same time, it is a remainder limited by way of use or devise. When a use cuts short another granted estate, it is called a shifting use. When it cuts short the estate of the person creating it, it is called a springing use."

(2). Devise to C and his heirs; but on the marriage of B with F, then to B and his heirs. Is B's estate good by way of remainder? Manifestly not, because it mounts a fee on a fee. Therefore, B's estate cannot be a remainder; and hence it can be and is an executory devise, being found in a will. Compare this example with a *shifting use*.¹

(3). Devise to B for twenty-one years; remainder to the first unborn son of B and the heirs of his body. Is the estate of the unborn son good by way of remainder? Manifestly not, because it is a *contingent* remainder of *freehold* without a *freehold* support. Therefore it cannot be a remainder; and hence it can be and is an *executory devise, being found in a will*. See Fearne, 395; 2 Jarm. Wills, 484.

(4). Devise to B for life, and after B's death, *and one week*, to C and his heirs. Is C's estate good by way of remainder? Manifestly not, for there is a gap between it and the particular estate. Therefore C's estate cannot be a remainder, and hence it can be and is an executory devise.

¹ EXECUTORY DEVISE OF A FEE ON A FEE.—In 2 Jarman on Wills, 485, it is said: "It will be apparent from what has been stated that every devise to a person in derogation of, or substitution for, a preceding estate in fee simple, is an executory limitation. Thus in the case of a devise to A and his heirs, and if he shall die under twenty-one and without issue (*i. e.*, without issue living at his death), or if he shall die without issue, living B, then to B; in each of these cases the devise to B is executory, in the same manner as if the fee, instead of being limited to A, had been suffered to descend to the heir at law of the testator, and the property had simply been devised to B on either of such events; the only difference being that in the one case the property shifts, on the happening of the contingency, from the prior devisee, and in the other, from the heir of the testator, to the devisee of the executory interest. No species of executory limitation is of such frequent occurrence as those which are limited in defeasance of a prior estate in fee."

Fearne, 398. For example of a limitation over taking effect in derogation of the particular estate, see *infra*, § 212.¹

§ 212. **Conditional Limitations.**—These constitute an important class of executory interests, void at common law as remainders, but allowed in wills, and in deeds by way of use. In a conditional limitation there is a limitation of an estate to A, which, however, on a certain condition subse-

¹ CAN EXECUTORY INTERESTS BE VESTED.—Fearne, *Remainders*, Introduction, 1, in his division of estates into vested or contingent, names as vested in interest: "Reversions, vested remainders, such executory devises, future uses, conditional limitations, and other future interests, as are not referred to or made to depend on a period or event that is uncertain." And see Fearne, p. 400, where he divides freeholds to commence *in futuro* into two classes. (1) "Where the deviser gives a future estate to arise *upon a contingency*," as a devise to the first son or the heir of J. S., when he shall have one, or a devise to the daughter of B who shall marry such a one within fifteen years"; and (2) "Where the future estate is not contingent, but limited in a certain event, as a devise to one to take effect six months after the testator's death." And Jarman says, speaking of a freehold to commence *in futuro* (2 Jarm. Wills, 484): "So a devise to a person or persons, whether *in esse* or not, to take effect at a given period after the death of the testator, as to A at the death of B (a stranger), or at six months from the testator's decease, obviously belongs to the class of limitations under consideration." And in Butler's note to Fearne, p. 398, it is declared that an executory devise of a fee after a fee may be made to take effect *on a certain event*, and the example is given of a devise of land "To A and his heirs, with a proviso that at the end of one year after the decease of B. it should devolve to C and his heirs."

But although the event upon which an executory interest may be limited to take effect may be *certain*, it is denied by Butler in his note to Fearne, p. 1, n. (a), that such an interest can properly be called a *vested* estate. He says: "It seems evident that as in all these cases the whole fee simple is either in the person from whom the land moves, or in his heirs, or is included in the actual limitations, the person taking under the conditional limitation, or executory devise, cannot, while the suspense continues, in the proper sense of the word have any *estate*, though the event on which it depends is certain of happening. A conveys land by

quent, is limited over to B. Under this head may be ranked a fee on a fee by way of an executory devise, or by way of a shifting use, as has been explained above. But there is another species of conditional limitation which now demands special attention, and which can be best understood by an example. Suppose by feoffment at common law land is conveyed "To A for life: provided, however, that if C re-

lease and release to B and his heirs to the use of C and his heirs from the first day of the following January; or devises land to C and his heirs from the first day of January next after the testator's decease. In the first case, the fee remains in A; in the second, it descends to the heir-at-law of A, till the day arrives upon which C is to be entitled to the land for an estate in fee simple in possession. In the meantime, C has not an estate in possession, as he has not a right of present enjoyment; he has not an interest in remainder, as the limitation to him depends on the estate in fee-simple, which, in the first case, remains in A, and in the second, descends to A's heir; he has not a contingent interest, as he is a person in being and ascertained, and the event on which the limitation to him depends is certain; and he has not a vested estate, as the whole fee is vested in A or his heirs. He, therefore, has no estate; the limitation is executory, and confers on him and his heirs a certain fixed right to an estate in possession at a future period." And Gray says (*Perpetuities*, § 114): "An interest to commence at a future time certain, *e. g.*, an executory devise to go into effect ten years after the testator's death, cannot be called contingent; but neither is it vested. It is an executory limitation. . . . Springing and shifting uses and executory devises are not vested interests until they take effect in possession, or are turned into vested remainders." And in § 99 Gray says: "The distinction [between vested and contingent interests] is of great importance as concerns the rule against perpetuities; for a vested interest is never obnoxious to the rule, while a contingent [or non-vested] interest not only may be, but often is." And in § 317 he declares: "Shifting and springing uses and executory devises are all, without question, subject to the rule against perpetuities"

By some text-writers, however, executory interests are classified as vested or contingent, after the analogy of vested or contingent remainders. See 2 Washb. R. P. 570; Tiedeman R. P., § 483, § 531; Hopkins R. P., 299, 301. Thus, in § 531, Tiedeman,

turns from Rome during A's life, A's life estate shall cease, and the land shall go to B and his heirs." The estate of B is called a *conditional limitation*, because it is an estate *limited* over to B after A's prior estate on *condition*. Now suppose C does return from Rome, can the limitation over to B take effect? It cannot as a *remainder*, for every remainder must, *ex vi termini*, await the *regular* expiration of the particular estate, and cannot cut it short, and take effect in derogation of it. See *ante*, § 182; also, § 209, (5). And if the limitation to B is to depend on the doctrine of *conditional* estates, it fares no better. For an estate granted on condition does not end *ipso facto* when the condition is broken. The grantor *must enter* and divest the estate; for he may *waive* the breach of condition if he chooses. And by the doctrine of maintenance *no one but the feoffor or his heirs* can make the entry; for nothing at common law that lies in *action*, *entry* or *re-entry* can be granted over. It follows that on C's return from Rome, B cannot himself enter on the land, but must wait for the entry of the feoffor. But suppose the feoffor enters. The effect is to annul the seisin

says: "The devise is vested when the person who is to take is *in esse*, and is ascertained, and when the event upon which he is to take is also certain. Such a devisee takes a vested future estate. When the estate is to vest upon an uncertain event, or in a person not definitely ascertained, the executory devise is contingent and partakes of the nature of a contingent remainder." For the different meanings of "vested," see Hawkins, Wills, 221, where it is said: "It is obvious that this division into 'vested' and 'contingent' fails when applied to future executory interests in land, not taking effect as remainders. An executory devise after a fee simple cannot be said to be 'vested' as an estate until it vests in possession; and yet it may be limited on an event absolutely certain to happen, and is, therefore, not contingent." But whether executory interests can ever properly be called vested or not, it is agreed that they are all subject to the rule against perpetuities, both those which are to take effect upon a certain event and those whose future existence depends upon a contingency. See 18 Am. Eng. Ency. Law, 341, 353; 20 Id., 918, 951.

given to A *ab initio*, and to revest the land in the feoffor as of his old estate. But on this seisin *the limitation to B depended*; and, therefore, the annulling of A's estate destroys B's also. And for these reasons conditional limitations are void at common law. But, as stated above, they are permitted under the statutes of uses and devises. For, as executory interests, they may take effect in derogation of the preceding estate; and no entry by the feoffor or his heir is necessary, because in a devise, or in a deed to uses, the happening of the contingency, or the non-performance of the condition, *ipso facto* determines the estate of the first taker, and vests it in the other to whom it is limited. "A conditional limitation is, therefore, of a mixed nature, partaking both of a condition and of a limitation; of a condition because it defeats the estate previously limited; and of a limitation, because upon the happening of the contingency, the estate passes to the person having the expectant interest without entry or claim." *Brattle Square Church v. Grant*, 3 Gray (Mass.), 142 (63 Am. Dec. 725), *per* Bigelow, J.; *Fearne* 274, 382, n. (a); 2 Jarm. Wills, 485; *Camp v. Cleary*, 76 Va. 140; 20 Am. & Eng. Ency. Law, 912.

§ 213. **Remainders in Deeds by Way of Use, and in Devises.**—We have seen that there can be remainders by way of use, and that a limitation in a deed to uses *must* be considered a remainder, unless it violates the rules governing remainders. Thus, a deed "To A and his heirs, to the use of B for life, remainder to the use of B's first unborn son and the heirs of his body," violates no rule for *remainders*, and is simply doing, by way of uses, what might as well have been done *directly*, without uses. Hence, the limitation to the unborn son cannot be considered an *executory use*, but is simply a *contingent remainder by way of use*.

Again, it must not be thought that, because a future limitation occurs in a *will*, it is, therefore, an *executory devise*; for there can be a remainder in a will, and the limitation *must* be considered a remainder, unless it violates the rules

governing remainders. Thus, "Devise to A for life, remainder to the first unborn son of A who shall reach the age of twenty-five years," violates no rule for remainders, and is simply an example of a *contingent remainder by will*. And it will be seen that this example does not violate the rule against perpetuities for contingent remainders heretofore stated (ante, § 187), for there is no estate given to an unborn person for life, followed by a remainder to the child of such unborn person. But at common law it runs the risk of failing, in case A dies before his son reaches the age of twenty-five years.

And it must be observed that, in conveyances to uses, where the uses are executed by the statute of uses and turned into legal estates, contingent remainders are subject to all the rules of the common law, and will fail if they are not ready to vest at the natural termination of the particular estate; and may be destroyed by forfeiture and merger. See *ante*, § 185; Fearne, 392-95; 20 Am. and Eng. Ency. Law, 883, 913. But, on the other hand, if there are contingent remainders in *trust estates*, that is, in England, in *unexecuted uses*, the common law rules as to the seisin do not apply to such remainders (the seisin remaining in the trustees), and they do not require to vest *eo instanti*, and are indestructible. See *Abbiss v. Burney*, 17 Ch. D., 211; Fearne (304); Wms. R. P. (17th ed.), 430, 473; Gray *Perpetuities*, § 325, note 1; 20 Am. and Eng. Ency. Law, § 884.

§ 214. Rules for Executory Devises.—(1). In general when one limitation in a will is taken to be an executory devise, all *subsequent* limitations must likewise be so taken. Thus, if one limitation after a fee simple is an executory devise, others are *a fortiori*; so if one freehold *in futuro* is followed by a second, or one conditional limitation by another; and so in other cases. Fearne on Rem. (503); 3 Lom. Dig. (311); 20 Am. & Eng. Ency. Law, 950.

(2). A limitation *once* good as a contingent remainder cannot *afterwards* be construed as an executory devise. But

if the devisee of a particular estate on which the contingent remainder depends dies in the lifetime of the testator, then the limitation may be good as an executory devise. For before the will takes effect, the particular estate lapses; hence when the will operates, there is no such estate. Fearne on Rem. 525; 2 Washb. R. P. (348); 2 Min. Ins. (4th ed.), 447; 2 Jarm. Wills, 496; *Carter v. Tyler*, 1 Call (Va.), 165.

(3). But an executory devise in the original form of the limitation may become, by after event, a contingent remainder. See Fearne, 526; 2 Min. Ins. 445, 448; 2 Jarm. Wills, 498; *Evers v. Challis*, 7 H. of L. Cas. 531.

(4). "It has been held that where an executory devise is limited *per verba presentis*, that is, where the devisee is mentioned as a person in present existence, and the commencement of the estate devised is not expressly deferred to a future period, then the devisee must be a person capable at the death of the devisor, or the devise will be void." Fearne on Rem. (533). Under this, such distinctions as these were taken: Devise to heirs of J. S., when J. S. is living at death of testator, is void; but to the heirs of J. S., *after death of J. S.*, is good. So, to first son of A, A having none, is void; but to the first son of A, when A shall have one, is good, because the devisor takes notice that A has no son, and intends a future gift. Fearne denies the distinction, and thinks all the cases good. Fearne, (495), (534). And see 2 Min. Ins. 449; Tied. R. P., § 533; 20 Am. & Eng. Ency. Law, 927.¹ A devise to a child *en ventre sa mere* is un-

¹ DEVISE PER VERBA DE PRESENTI AND PER VERBA DE FUTURO.—In 20 Am. & Eng. Ency. Law, 927, it is said: "Formerly it seems to have been held, that when an executory devise was limited *per verba de presenti*, that is, when the devisee was mentioned as a person *in esse*, and the commencement of the estate devised was not expressly deferred to a future period, the devise was void unless the devisee was capable of taking possession at the death of the devisor; otherwise if the devise was *per verba de futuro*, and expressly deferred to a future period. This distinction, if valid at all, is equally applicable to springing uses,

doubtedly good, though formerly doubted. Fearne on Rem. (536); 3 Lom. Dig. (322); 2 Min. Ins. 449. And a bequest to a corporation not yet created is good, if the intent be clear that the charter shall be obtained within the time prescribed by the rule of perpetuities, as where the testator directs his executors to apply therefor. *Inglis v. Trustees, &c.*, 3 Pet. 115; *Lit. Fund v. Dawsons, &c.*, 10 Leigh, 152; S. C., 1 Rob. 418; *Kinnaird v. Miller*, 25 Grat. 107; 2 Min. Ins. 444.

(5). An executory devise of a fee on a fee is not affected by the failure of the first estate to take effect by lapse or otherwise; but that which was to be an *executory* devise is accelerated, and becomes a devise *in presenti*, and takes effect at the death of the testator. Thus in a devise "To A and her heirs, but if A dies under twenty-one and unmarried, then to B and his heirs," with a residuary devise to C; if A dies under twenty-one and unmarried *before the testator dies*, the executory devise to B takes effect immediately on the death of the testator, and does not *lapse* in favor of the residuary devisee, C. Fearne (510); 2 Wash. R. P. (355); 3 Lom. Dig. 314; *Mathis v. Hammond*, 6 Rich.

but its validity is extremely questionable." And in 2 Min. Ins. (4th ed.), 449, the law is thus stated: "At present, however, this needless distinction between limitations to non-existing persons, *per verba de presenti* and *per verba de futuro*, is very little regarded, and is allowed to affect those cases only where there is not the least circumstance from which to collect the testator's or grantor's intention of anything else than an immediate limitation to take effect *in presenti*." Jarman seems to ignore the distinction. Thus in speaking of an executory devise of a freehold to commence *in futuro*, he says (2 Jarm. Wills, 483): "The first-mentioned species of executory estate occurs as well when the devise is future in its operation from the non-existence of the object at the death of the testator, as when it is future in the express terms of its limitation. Thus a devise to the children of A, who happens to have no child at the death of the testator, or to the heirs of the body of A, a person then living, is executory for the reason suggested."

Eq. (S. C.) 121; *Avelyn v. Ward*, 1 Ves. Sr. 420. But see *Allen v. Parham*, 5 Munf. (Va.) 467.

§ 215. **Rule of Perpetuities for Executory Interests.**—Any executory interest which, by possibility, may not take effect until after lives in being and twenty-one years and ten months, is *ipso facto* and *ab initio* void. In other words, the executory interest is void for remoteness if at its creation there exists a *possibility* that it may not take effect during any fixed number of now existing lives, nor within twenty-one years and ten months after the expiration of such lives, even though it is highly probable, or, indeed, almost certain, that it will take effect within the time prescribed. In the application of the rule, twenty-one years are allowed independently of any person's actual minority, but the ten months (period of gestation) are allowed only when there is a child *en ventre sa mere*. See 2 Bl. Com. (Sharswood's ed.) 174, n. 14; 2 Bl. Com. (Cooley's ed.) 175, n. 12; Tied. R. P., § 544; 1 Jarm. Wills (5 Am. ed.), 502; Wms. R. P. (318); Gray, Rule against Perpetuities, §§ 201–268; 90 Am. Dec. 101–106, n.; 18 Am. & Eng. Ency. Law, 335; *McArthur v. Scott*, 113 U. S. 340, 382; *Hopkins v. Grimshaw*, 165 U. S. 342, 355; *Stone v. Nicholson*, 27 Grat. 1; *Woodruff v. Pleasants*, 81 Va. 37, 42; *Otterback v. Bohrer*, 87 Va. 548; *Whelan v. Reilly*, 3 W. Va. 597, 612.¹

¹ RULE AGAINST PERPETUITIES.—In *Hopkins v. Grimshaw*, 165 U. S. 342, 355, the rule is stated by Gray, J., as follows: "An estate, legal or equitable, granted or devised by one person to another, which, by the terms of the instrument creating it, is not to vest until the happening of a contingency, which, by possibility, may not occur within the period of a life or lives in being (treating a child in its mother's womb as in being), and twenty-one years afterwards, is void for remoteness." That a child *en ventre sa mere* may be considered a *life in being*, so as to omit in the statement of the rule reference to the period of gestation, see Gray, Perpetuities, § 201, § 220; 1 Jarm. Wills, 518; 18 Am. & Eng. Ency. Law, 341. And the same authorities show that there may be *two periods of gestation* allowed in the same limitation; for in a devise to such of the testator's grandchildren as shall

§ 216. Examples of Executory Interests Violating the Rule against Perpetuities.

(1). Devise to the first son of A (A being alive at the testator's death) who shall attain the age of twenty-five years. For if A were to die leaving a son a few months old, the

reach the age of twenty-one, a child of the testator might be *en ventre sa mere* at the testator's death, and such a child might die leaving a posthumous child, who would nevertheless be entitled on reaching the required age. See Gray, Perpetuities, § 221, § 370; 18 Am. & Eng. Ency. Law, 341. Indeed, Gray (Perpetuities, § 222) supposes a case where a *third* period of gestation might be allowed. And in Jarman, Wills, p. 517, it is said: "To treat the period of gestation, however, as an adjunct to the lives, is not, perhaps, quite correct. It seems more proper to say that the rule of law admits of the absolute ownership being suspended for a life, or lives in being, and twenty-one years afterwards, and that, for the purposes of the rule, a child *en ventre sa mere* is considered as a life in being."

In 2 Min. Ins. (4th ed.) 438, the rule against perpetuities is thus stated: "Every executory limitation, whether of real or personal estate, in order to be valid, must vest *in interest*, if at all, within a life or lives in being, and the utmost period of gestation (ten months in Virginia), and twenty-one years thereafter." And in 18 Am. & Eng. Ency. Law, 347, it is said: "The essential requirement is that the limitation be such that it cannot possibly take effect beyond the prescribed period; but a limitation is not void merely because it will not certainly take effect within that period, since a valid limitation might be one which must take effect within the period, or not at all." And see Gray, Perpetuities, §§ 201, 214, 325.

In Williams, Real Property (17th ed.), 465, the effect of the rule against perpetuities is thus described: "It requires every future estate limited to arise by way of shifting [or springing] use or executory devise to be such as must necessarily arise [if at all] within the compass of existing lives, and twenty-one years after, with the possible addition of the period of gestation, in the case of some person entitled being a posthumous child. But if no lives are fixed on, then the term of twenty-one years only is allowed. And every executory estate which might in any event transgress the limits so fixed, will, from its commencement, be absolutely void. . . . When a gift is infected with the vice of its possibly exceeding the prescribed limit, it is at once and

estate of the son would take effect at a time exceeding the period of twenty-one years from the death of A, whose life is, in this case, the *life in being*. Wms. Real Prop. (319); Gray, §§ 215, 369-375.

(2). Devise to the first son of A (A being alive at the testator's death) who shall attain the age of twenty-one years and ten months.

(3). Devise to such of the testator's grandchildren as shall attain the age of twenty-five years. *Newman v. Newman*, 10 Sim. 51; *Leake v. Robinson*, 2 Merivale, 363; *Stuart v. Cockerell*, 5 Ch. App. 712; Gray, §§ 370-374.

(4). Devise to such of the testator's grandchildren as shall survive both their parents, viz., the testator's child, and his or her wife or husband. For the testator's child may marry some person unborn at the testator's death; and as the gift to the grandchildren is not to take effect until after the death of *both* of their parents, this, in the case supposed, would be after a life *not in being at the testator's death* which makes the gift to the grandchildren void for remoteness. Gray, § 370, note 1; also § 214. See *Stone v. Nicholson*, 27 Grat. 1.

§ 217. Examples of Executory Interests not Violating the Rule against Perpetuities.

(1). Devise to the first son of A (A being alive at the testator's death) who shall reach the age of twenty-one years. 1 Jarm. Wills, 515; Wms. R. P. (17th ed.) 465-'66.

(2). Devise to such of the testator's grandchildren as shall attain the age of twenty-one years. 1 Jarm. Wills, 542; Gray, § 370; *Woodruff v. Pleasants*, 81 Va. 37, 42.

(3). Devise of the income of property to be accumulated during the lives of all the testator's children, grandchildren,

altogether void, both at law and in equity. And even though in its actual event, it should fall greatly within such limit, yet it is still as absolutely void as if the event had occurred which would have taken it beyond the boundary." See *London, &c., R. Co. v. Gomm*, 20 Ch. D. 562.

and great-grandchildren, who were living at the time of his death, for the benefit of certain future descendants of the testator, *to be living at the death of the survivor* of the aforesaid children, grandchildren, and great-grandchildren. *Thellusson v. Woodford*, 4 Vesey, 221; 11 Id. 112. This extraordinary limitation occurred in the will of Peter Thellusson, an English merchant of great wealth, and was sustained as being within the limits prescribed by the Rule against Perpetuities. Wms. R. P. (320); Gray, §§ 190, 216, 686; 2 Min. Ins. (4th ed.) 451-454.

(4). Testator wills that part of his estate devised in trust shall not be divided "until the youngest child of all my said children shall be twenty-one years of age"; and in the same paragraph directs that "when the youngest child now, and which shall hereafter be born, of all my said children shall have reached, or, if living, would have reached the age of twenty-one years," then the trustee shall sell the property and divide the proceeds "among such of my children as may *then* be living, and the descendants of those who may have died (they taking a parent's part)." *Held*, (1) that the testator refers to his youngest *grandchild*; and (2), that the period of division is not too remote, as the estate must vest during lives in being, and the utmost period of gestation, and twenty-one years thereafter. *Otterback v. Bohrer*, 87 Va. 548. See Gray, § 370.

§ 218. Upon What State of Facts Does Remoteness Depend.—In applying the Rule against Perpetuities, it should be borne in mind that the question of remoteness depends upon the state of facts at the time of the testator's death, though differing from that existing at the date of the will. See 1 Jarm. Wills (5th Am. ed.), 519; Gray, Perpetuities, § 231; 18 Am. & Eng. Ency. Law, 341, 347; *McArthur v. Scott*, 113 U. S. 340, 382; *Pleasants v. Woodruff*, 81 Va. 37, 42. It follows that a devise which would have been void if the testator had died immediately after making his will may be valid under the circumstances existing at his death.

Thus, in the example given above, "Devise to the first son of A (A being alive at the testator's death) who shall attain the age of twenty-five years," which is void for remoteness, if A were to die before the testator, leaving a son, the gift to the son would be valid; for though the estate of the son is not to vest until the son reaches twenty-five, yet it must necessarily take effect, if at all, within a life in being at the testator's death, viz., the son's own life. And the devise would also be valid if a son of A had attained the age of twenty-five before the testator's death, although A survived the testator. See Wms. Real Prop. (17th ed.), note (1), citing 1 Jarm. on Wills (4th ed.) 354; (5th Am. ed. 529); *Picken v. Matthews*, 10 Ch. D. 264. And see Gray, Rule against Perpetuities, § 379.¹

¹ PAST THE AGE OF CHILD-BEARING.—No matter how old a person may be at the death of the testator, the law still presumes the possibility of issue, and thus a gift may be void for remoteness. See 18 Am. and Eng. Law, 347; *In re Dawson*, 39 Ch. D., 155; *Carney v. Kain* (W. Va.), 23 S. E. 650, 657, citing *List v. Rodney*, 83 Pa. St. 483, 492. In Gray on Perpetuities, the law is thus stated: "In one class of cases, from the difficulty and delicacy of determining the question involved, the occurrence of a contingent event beyond the required limits will be considered as possible, although it is physically impossible. If a devise be made to those of a woman's children who reach twenty-five, the gift is too remote, although the woman be of such an age [at the testator's death] that it is certain that she can have no more children, and therefore the event must occur, if at all, in the lives of persons in being, viz.: of her children alive at the testator's death. In other words, for the purpose of determining questions of remoteness, men and women are deemed capable of having issue so long as they live. This was held by Sir Lloyd Kenyon in *Jee v. Audley*, 1 Cox, Ch. 324, and his decision has never been questioned." *Jee v. Audley* is followed in the case of *In re Dawson*, *supra*; and on a question of remoteness, it was held that evidence was inadmissible to show that a woman over sixty years of age at the testator's death was past the age of child-bearing.

§ 219. Are There Two Rules against Perpetuities, One for Contingent Remainders and Another for Executory Interests?—Mr. Williams, in his authoritative work on Real Property, contends that there are *two different rules*. See Wms. R. P. (17th ed.) 469; *ante*, § 187, “Rule of Perpetuities for Contingent Remainders.” But in Gray’s *Rule against Perpetuities*, it is argued, with great force and learning, that there is but one rule against perpetuities, namely, that “No interest subject to a condition precedent is good, unless the condition *must* be filled, if at all, *within twenty-one years after some life in being* at the creation of the interest,” and that this rule applies alike to contingent remainders and to executory interests. See Gray, § 201; also §§ 284-298. And see, for further discussion of the question, 1 Jarm. Wills, 521-’28; 3 Id. App’x, 711; 18 Am. and Eng. Ency. Law, 342, note; 20 Id. 876, note; 90 Am. Dec. 103, note. But the view of Mr. Williams has recently received judicial approval in England, in *Whitby v. Mitchell*, 42 Ch. D. 494 (also 44 Ch. D. 85), where it is held that a remainder limited in a settlement to the children of an unborn person, after a life estate to the unborn parent, was void, and could not be made good by saying, “provided that such children shall be born within a life or lives now in being, and twenty-one years afterwards”; thus showing that the rule for contingent remainders, which declares that an estate cannot be limited to an unborn person for life, followed by an estate to a child of such unborn person, is considered in England *an independent rule*, and not merely an instance of the rule by which executory interests are restrained. For further explanation of the decision in *Whitby v. Mitchell*, see Wms. R. P. 17th ed.) 469-472; 18 Am. and Eng. Ency. Law, 342, note. See, also, *In re Frost*, 43 Ch. D. 246.

§ 220. Are there Two Rules against Perpetuities in Virginia?—Whether Professor Gray is right or not in his contention that *there never was but one rule*, namely, the rule requiring future estates to take effect during existing lives,

etc., it would seem necessary, *under the Virginia statute*, to apply this rule to contingent remainders, in order to prevent them from tying up lands beyond the bounds of public policy. At common law, a safeguard against the inalienability of lands by the creation of contingent remainders was found in the rules governing the *seisin*, and in the requirement that a contingent freehold remainder must vest, if at all, during the particular estate, or at the moment of its termination. This rule was *re-enforced* by the rule against perpetuities for contingent remainders, namely, that no estate can be given an unborn person for his life, followed by a remainder to the child of such unborn person. (See *ante*, § 187.) But now, in Virginia, by statute, "A contingent remainder shall in no case fail for want of a particular estate to support it," and the remainder may vest at any time in the future after the particular estate has terminated. Thus, if there be a deed "To A for life, remainder to the first unborn son of A who shall reach the age of forty-five years," A might not have until ten months after A's death, and then the remainder could not vest until the son reached the age of forty-five years; and yet the remainder would not fail, under the Virginia statute, for want of a freehold support. But this might tie up the land beyond twenty-one years after existing lives (in this case the life of A), unless the rule of perpetuities for executory interests be applied to the case; and this, it is believed, would be done in Virginia. See *Moon v. Stone*, 19 Grat. 130; *Stone v. Nicholson*, 27 Id. 1. And see, in accord with this view, Hopkins, Real Prop. 326; Gray, Perpetuities, § 286; 18 Am. and Eng. Ency. Law, 342. In 20 Am. and Eng. Ency. Law, 894, it is said: "It would seem that legislation which, either directly or indirectly, has the effect of making a contingent remainder indestructible would, almost necessarily, have the further effect of subjecting it to the rule against perpetuities, since it was originally exempted

from its operation solely on the ground of its destructible character.”¹

§ 221. **Definite and Indefinite Failure of Issue.**—A failure of issue is called *definite* when it is to take effect by the terms of the limitation at some *certain time*; it is called *indefinite* when it may occur at any time in the future. At common law the presumption is in favor of an *indefinite*

¹ **RULE OF PERPETUITIES FOR CONTINGENT REMAINDERS.**—The English statute of 40 and 41 Vict., ch. 33, protecting a contingent remainder (created by any instrument executed or will republished on or after the 2nd of August, 1877) from destruction by reason of failure to take effect during the continuance of the particular estate or *eo instanti* that it determines, guards against the danger of thereby causing a perpetuity by requiring that the remainder, to be entitled to protection, shall be so limited that it would have been valid if originally created as a shifting use or executory devise. Wms. R. P. 419; 18 Am. & Eng. Ency. Law, 342. And see Wms. R. P. 468, where the statute is thus explained: “We have now seen, however, that for a limitation to be valid as a shifting use or executory devise, it must conform to the rule against perpetuities. No contingent remainder will, therefore, be preserved by this act unless it be such as must necessarily vest within the duration of existing lives and twenty-one years after. Thus, if land be granted after 1877 to A, a bachelor, for life, and after his death to his first son who shall attain the age of twenty-four years, the gift to A’s son is good as a contingent remainder, and may take effect if a son of A attain twenty-four in A’s lifetime. But if A die before any son of his attain twenty-four, the contingent remainder to A’s son will fail altogether by the common law rule, as not having vested before or at the termination of the particular estate. And it will not be saved by the Act of 1877; because, as we have seen, it would not have been valid if originally created as a shifting use or executory devise.” It will be observed, however, that in the case supposed the unborn son of A has, under the English statute, a *chance* to obtain the land, as he may reach the age of twenty-four in A’s lifetime. The Virginia statute, on the other hand—“a contingent remainder shall *in no case fail* for want of a particular estate to support it”—includes all contingent remainders; and, in thus rendering them *indestructible*, subjects them to the rule against perpetuities for executory interests. Applying this rule to the case supposed,

failure, when a limitation over is to take effect on death without issue. Thus, "Devise to A for life, and if A die without issue, then to B and his heirs," imports an indefinite failure of the issue of A; and the meaning is that B is to take, not only in case A has no issue living at the time of his death, but also in case A has issue living at his death, if in the thereafter such issue should fail at any future time. In other words, A is said to "*die* without issue" whenever A is dead and A's issue is extinct, no matter when the issue fails. In this sense Adam would have "died without issue" if there had been no survivors of the flood, and might even do so now if all of his descendants should perish from off the face of the earth. Wms. R. P. 290; 3 Jarm. Wills, 296; Gray Perpetuities, §§ 211-213; 11 Am. & Eng. Ency. Law, 899-912.¹

the remainder to the first unborn son who shall reach the age of twenty-four, is void *ab initio*, and this regardless of the fact that he may, or actually does, reach the required age before his father dies. See *Abbiss v. Burney*, 17 Ch. D. 211; Gray, Perpetuities, § 325.

But it does not follow that because now in Virginia contingent remainders, as indestructible interests, are subjected to the rule of perpetuities for executory interests, that therefore they are exempted from the operation of the rule (now declared to exist in England) which forbids the gift of an estate to an unborn person for life, followed by a remainder to the child of such unborn person. For if the decision in *Whitby v. Mitchell*, 42 Ch. D., 494, be followed in Virginia, the limitation to the child of an unborn parent, after a life estate to the parent, is not validated by expressly confining the remainder to such child of the unborn parent as shall be born within the compass of lives existing at the time of the gift, and twenty-one years afterwards (see *ante*, § 219); and to such a limitation the rule forbidding successive life estates to unborn persons is still applicable. And see 2 Min. Ins. (4th ed.), 414, which seems to recognize the old doctrine forbidding a possibility on a possibility, from which the rule invalidating a limitation, by way of remainder, to the unborn child of an unborn child, after a life estate to the unborn parent, has been said to be derived. But see L. Q. R., July, 1898, p. 234.

¹ DEFINITE AND INDEFINITE FAILURE OF ISSUE.—The meaning of

§ 222. Effect of a Limitation Over, Dependent on if He Die Without Issue, on a Prior Estate for Life.—Take the limitation, “To A for life, and if A die without issue, then to B and his heirs,” and suppose it to occur in a *will*, and

“definite” and “indefinite,” as applied to a failure of issue, is thus clearly stated by Kent: “A definite failure of issue is when a precise time is fixed by the will for the failure of issue, as in the case of a devise to A, but if he *dies without lawful issue living at the time of his death*. An indefinite failure of issue is a proposition the very converse of the other, and means a failure of issue, whenever it shall happen, sooner or later, without any fixed, certain, or definite period within which it must happen. It means the period when the issue or descendants of the first taker shall become extinct, and when there is no longer any issue of the issue of the grantee, without reference to any particular time or any particular event.” 4 Kent’s Com. (11th ed.),* 274.

The rule is well settled that words referring to the death of a person without issue, unexplained by the context, and in the absence of a statute changing their meaning, are construed to import a *general indefinite failure of issue*—i. e., a failure or extinction of issue *at any period*. 3 Jarm. Wills, 297.

This construction of the words “dying without issue,” which is called the *legal* as distinguished from the *vulgar* construction, had its origin, no doubt, in the language of the statute of *De Donis*, by which estates-tail were created. The statute declares that land given to one and the heirs of his body “shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver, or his heirs, if issue fail (whereas there is no issue at all), or if any issue be, and *fail by death, or heir of the body of such issue failing*.” Westm. 2, 13 Ed. I., c. 1, 1285; 2 Washb. Real Prop., p. 694, app’x. “It was the command of the statute,” says Kent, C., in *Anderson v. Jackson*, 16 Johns R. 382, 405, “that probably led the courts to give a uniform construction to the words, in a deed or will, *dying without issue*; for the statute said that the land should remain unto the issue of the grantee until such *issue fail*.” And see Hawkins, Wills, 205.

But the common law presumption of an indefinite failure of issue is a rule of construction, and not a rule of law; and it may be rebutted by the context if it clearly appears that a definite failure was intended. 3 Jarm. Wills, 308. Thus words may be used clearly confining the failure of issue to the death of the

that the failure of issue is *indefinite*. Then A takes a fee tail, and B a vested remainder in fee simple. A's life estate is *raised* (or enlarged) to a fee tail by implication, in order to effectuate the intent of the testator. The grounds of the implication may be thus stated. The word "issue" in a will is equivalent to "heirs of the body." Hence, a devise, "To A and his issue," gives A an estate tail; and so does a devise "To A for life, remainder to his issue," by the Rule in Shelley's Case. Now, when the failure of issue is *indefinite* (*i. e.*, a failure at any time in the hereafter) the word "issue" is not confined to descendants in the *first* degree (*i. e.*, children), but comprises *all* the descendants, as a class of persons to take indefinitely in succession (*i. e.*, by continuous descent to children's children *in infinitum*). If now there is a devise "To A for life, and if A die *without* issue, then to B and his heirs," there is a presumption of intent that if A dies *with* issue, they are to take. For the estate of B is not to take effect unless A dies *without* issue, which implies that on A's death *with* issue, they are to succeed him. Hence, the construction is, "To A for life, remainder to issue of A; and

person who first takes, or some other person; as *e. g.*, "If A die without issue living at his death;" or, "If A shall die under the age of twenty-one and without issue (*Withers v. Sims*, 80 Va. 651); or, "If A should die without issue, living B, his brother." And, as stated by Gray (*Perpetuities*, § 213, n. 2), "A definite failure of a man's issue is not necessarily a failure at his death; a failure in any particular generation or generations of his descendants is equally definite. Whether such gift [*i. e.*, a gift to take effect after a definite failure of issue] would be too remote can easily be determined. Practically, the question always arises between a definite failure at his own death, and an indefinite failure in any generation." For full discussion of the expressions which have been held to denote a definite failure of issue, see 3 Jarm. Wills (5th Am. ed.), 308-339; Hawkins, Wills (2nd Am. ed.), 205-212; 2 Min. Ins. (4th ed.), 440-443 (where the Virginia cases are collected); 11 Am. & Eng. Ency. Law, 899-916. And see *Burfoot v. Burfoots*, 2 Leigh (119); *Taylor v. Taylor* (Pa.), 3 Am. Rep. 565.

if A die without issue (*i. e.*, in default of issue of A), remainder to B and his heirs." And this, as we have seen, gives A a fee tail by the Rule in Shelley's case, by which rule, "To A for life, remainder to the issue of A," is equivalent to "To A and his issue." *Bradley v. Cartwright*, L. R. 2 C. P. 511, 524; *Roddy v. Fitzgerald*, 6 H. of L. Cas. 823, 877; *Ralph v. Carrick*, 11 Ch. D. 883; *Tate v. Talley*, 3 Call, 354; *Jiggetts v. Davis*, 1 Leigh, 419; *Wine v. Markwood*, 31 Grat. 43, 51; 3 Jarm. Wills, 283; 2 Min. Ins. (4th ed.) 456.¹

§ 223. **Effect of the Words If He Die Without Issue on a Prior Fee Simple.**—Take a devise "To A and his heirs; and if A die without issue, then to B and his heirs." Here again A takes a fee tail, and B has a vested remainder. A takes the fee tail by implication to effectuate the testator's intent. For the estate of B is to take effect if A dies without issue at any future time, the failure of issue being *indefinite*; and of course the estate of A is to end when that of B takes effect. The estate, however, given to A *in terms* is a fee simple, and this does not end by *failure of issue*; whereas such failure makes the regular termination of an estate tail. Hence, it is manifest that as B is to take on the failure of the issue of A, A is to keep the land only *so long as he has issue*, and this is a fee tail in A. So the word "heirs" is construed to mean "heirs of the body," and this gives A a fee tail, followed by a vested remainder to B. But for this construction B's

¹ **LIFE ESTATE ENLARGED TO A FEE TAIL.**—The effect of the limitation in giving the first taker a fee tail is sometimes ascribed to the doctrine that the *general* overrules the *particular* intent. This explanation, however, has been criticised, and the doctrine of "general" and "particular" intent has been pronounced "as a general proposition incorrect and vague, and likely to lead in its application to erroneous results." *Doe v. Gallini*, 5 B. & Ad. 640, per Lord Denman. See also the strong observations of Lord Wensleydale in *Roddy v. Fitzgerald*, 6 H. of L. Cas. 823, 877. In 3 Jarm. Wills, 284, it is said that the doctrine in its proper sense is merely descriptive of the operation of the Rule in Shelley's Case.

estate would be *void*. For it cannot be a remainder after a fee simple; and as an executory devise it would be void as violating the Rule against Perpetuities, being limited after in *indefinite* failure of the issue of A, which might not occur for many generations. Thus we see that the legal effect of a devise "To A *for life*, and if he die without issue, remainder B and his heirs," is identical with that of "To A *and his heirs*, and if he die without issue, remainder to B and his heirs," and that in each case A has a *fee tail*, followed by a vested remainder. In the one case A's life estate is *enlarged*, and in the other A's fee simple is *reduced*, to a fee tail; or, as has been said, the life estate is "levelled up," and the fee simple "levelled down," and both meet at the fee tail. *Jiggetts v. Davis*, 1 Leigh (368), (418); *Barber v. Pitts-burgh, etc.*, R. Co., 166 U. S. 83, 104.¹

¹ FEE SIMPLE REDUCED TO A FEE TAIL.—The reason for this construction is thus stated by Preston: "A gift to a man and his heirs, and if he shall die without heirs of his body, or without issue male of his body, . . . or in like form, then to others, conveys an estate tail; for the subsequent words demonstrate the qualified sense in which the word *heirs* is used; and the several parts of the instrument show that no heirs are to be entitled under the terms of the gift, except those which are the issue of the body of the donee." And again: "The whole instrument taken together evinces the meaning of the author of the limitation to be that the property which is the subject of his gift shall revert to himself or be enjoyed by some other person, as soon as there shall be a failure of the *heirs of the body* of the person who takes under the gift in question; and no construction save that only which creates an estate tail can give effect to this intention. The operation of the subsequent clause is to abridge and correct the words of limitation used in the preceding sentence by explaining their import; and the words in this clause are allowed to have this effect for the purpose of conforming to the will of the donor, and ascribing to him some meaning in the use of the different clauses of the deed." 2 Prest. Est. 505. See also *Bells v. Gillespie*, 5 Rand. 288, 306; *Jiggetts v. Davis*, 1 Leigh 418.

It will be noticed that, in the above extract, Preston is speaking of a *deed*. And it seems to be settled that the effect of the limitation *now* under consideration is the same in deeds and wills,

§ 224. **No Estate Tail by Implication when the Failure of Issue is Definite.**—In neither of the two cases considered under the two preceding sections can there be an estate tail raised by implication when the failure of issue is definite. *Taylor v. Taylor* (Pa.), 3 Am. Rep. 565.

(1). Devise to A for life, and if A die without issue *living at his death*, remainder to B and his heirs.

(a). *In England.* A takes an estate for life, and B has a remainder in fee, contingent on A's dying without issue living at his death. *Plunkett v. Holmes*, 1 Lev. 11; Raym., 28; *Lethieullier v. Tracy*, 3 Atk. 774, 793; *Jenkins v. Hughes*, 8 H. L. Cas. 571, 593; *Coltsmann v. Coltsmann*, L. R., 3 H. L. 132; Fearn, Cont. Rem. 341; 2 Jarm. Wills, 138.

The better opinion in England is that in this case, as well as when A's estate is a fee simple, the words, "if A die without issue living at his death," are but words of contingency, and do not operate by implication to create an estate in A's issue living at his death (if any) as purchasers. *Monypenny v. Dering*, 7 Hare, 588; *Coltsmann v. Coltsmann*, L. R., 3 H. L. 133, per Cairns, C.; 3 Jarm. Wills, 144. It follows, of course, that as the words, "issue living at his death" are not words of *limitation*, they cannot affect the estate of A, which remains an estate for life.

This construction, which refuses to raise by implication an estate in favor of the issue of A, living at his death, is contrary to a *dictum* of Lord Hardwicke in *Lethieullier v. Tracy*, 3 Atk. 796, and is regretted by Jarman as involving the "palpable absurdity of making the estate of the

the reasoning being equally applicable to both. The word "issue" does not become a word of limitation (this the law does not allow in a deed), but merely qualifies the meaning of "heirs," showing that heirs of the *body* are meant. See 1 Shepp. Touchstone, *103; 3 Bac. Abr. Estates Tail, B.; 2 Lom. Dig. 222; *Fisher v. Wigg*, 1 P. Wms. 14; *Idle v. Cook*, Ib. 70; *Morgan v. Morgan*, L. R., 10 Eq. 99; *Anderson v. Jackson*, 16 Johns R. 382, 405.

ulterior devisee (B) depend on the contingency of there not being issue (of A), and yet in the alternative even (*i. e.*, when there is issue of A), giving the property neither to A himself nor to such issue, but leaving it to devolve to the heir-at-law or residuary devisee (as the case may be) of the testator." 3 Jarm. Wills, 139, 144.

(*b*). *In Virginia*. A has life estate, and there are two remainders in fee upon a contingency with a double aspect, both of which are contingent until the death of A. Upon that event, if there is issue of A living, the first remainder vests in each issue, and the second is defeated; if there is no issue of A living at his death, then the second remainder, to B, vests and takes effect. *Warners v. Mason*, 5 Munf. 242; *Wine v. Markwood*, 31 Grat. 43. See § 183, *supra*.

This construction differs from that which obtains in England in implying a remainder in favor of the issue of A, if any, living at his death, thus avoiding the absurdity complained of by Jarman. It follows that the *reason* why A's estate is for life only in Virginia is that though the words, "if A die without issue living at his death," are not mere words of contingency, as in England, yet they are not words of *limitation*, but words of *purchase*, comprising the issue at a particular time; and being words of purchase, they cannot operate to enlarge, or in any wise affect, the previous estate to A. See *Smith v. Chapman*, 1 H. and M. 240, 292, 298; *Cooper v. Hepburn*, 15 Grat. 551; *Moon v. Stone*, 19 Id. 130, argument of Wm. Green, pages 232, 245; *Daniel v. Whartenby*, 17 Wall. 639.

(2). Devise to A and his heirs, and if A die without issue *living at his death*, remainder to B and his heirs. Here A takes a fee simple, and B has a fee, good by way of executory devise, not too remote because of the *definite* failure of issue. *Burfoot v. Burfoots*, 2 Leigh (119).

The reason that A's fee simple is not in this case reduced to a fee tail is that "issue living at his death" cannot be regarded as words of limitation to qualify and correct the

meaning of the word "heirs." To be a word of limitation, issue must embrace descendants of every degree, and cannot be satisfied by being applied to descendants at a given period; it must "take in all issues to the utmost of the family, as far as heirs of the body would do." 3 Jarm. Wills, 200; *Roddy v. Fitzgerald*, 6 H. L. Cas. 882. Hence it is considered that the testator did not intend by the words, "if A die without issue living at his death," to provide *indefinitely* for the issue of A, but merely to limit a contingency on which the estate of A was to be defeated, and that of B to take effect. For the clause, "if A die without issue," is not absolute and indefinite whensoever he die without issue, but it is with a contingency if he die without issue living at his death. *Pells v. Brown*, 3 Cro. (Jac.), 540; *Anon.*, 3 Dyer, 354 a; *Barnfield v. Wetton*, 2 Bos. & Pul., 324; *Coltsmann v. Coltsmann*, L. R., 3 H. L., 132; *Jiggetts v. Davis*, 1 Leigh, 420; *Thomason v. Andersons*, 4 Id., 118; *Jackson v. Chew*, 12 Wh., 153; *Abbott* 1. Essex Co., 18 How., 202; Wms. R. P. (5th ed.), 215, note, citing American cases; 3 Jarm. Wills, ch. xli.

§ 225. **If He Die Without Issue Now in Virginia.**—By statute taking effect January 1, 1820, the old common law presumption of an *indefinite* failure of issue was altered in Virginia, and the presumption of a *definite* failure was made to take its place. The language of this most important statute is as follows: "Every limitation in any deed or will contingent upon the dying of any person without heirs, or heirs of the body, or issue of the body, or offspring, or descendant, or other relative, shall be construed a limitation to take effect when such person shall die not having such heir, or issue, or child, or offspring, or descendant, or other relative, as the case may be, *living at the time of his death, or born to him within ten months thereafter*, unless the intention of such limitation be otherwise plainly declared on the face of the deed or will creating it." See 1 Rev. Code (1819) ch. 99, § 26; Code (1887), § 2422. A similar statute was

passed in England, to take effect January 1, 1838. And statutes making the failure of issue *definite* have been passed in the United States generally.¹

¹ FAILURE OF ISSUE MADE DEFINITE BY STATUTE IN ENGLAND.—By 1 Vict. ch. 26, § 39, it is declared (3 Jarm. Wills, App'x, 801): "In any devise or bequest of real or personal estate, the words, 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise"; with a further proviso not necessary to be here stated. It will be seen that the English statute does not alter the common law presumption of an indefinite failure of issue, when the person, to the failure of whose issue reference is made, has *already* an estate tail; but the Virginia statute, set out above, makes no such exception, for the reason, no doubt, that in Virginia the prior estate tail is, by the Act of 1776, immediately converted into an estate in fee simple. See *Elys v. Wynne*, 22 Grat. 224.

As to the effect of the English statute on the *implication* of estates tail, it is said by Jarman (2 Jarm. Wills, 143): "No implication of an estate tail can arise from words importing a failure of issue in a will made or republished since the year 1837, unless an intention to use the phrase as denoting an indefinite failure of issue is very distinctly marked," quoting the statute of 1 Vict. ch. 26 above cited. He then goes on to show that in a devise "To A and his heirs; and if A die without issue, to B and his heirs," A will take, under the new rule of construction, an estate in fee simple, subject to an executory devise in favor of B, in the event of A's dying without leaving issue at his death; and that, by a will since 1837, in a devise "To A for life, and if A die without issue, to B," A will take an estate for life only, with a contingent remainder to B, to take effect in the event of A's dying without issue living at his death. But that there is in England no implication of a remainder in favor of the issue of A living at his death, if such there be, see § 224, *supra*. And see, also, as to the effect of the English statute, Wms. R. P. (17th ed.), 291; Hawkins, Wills (2nd Am. ed.), 214.

§ 226. **Effect of Virginia Statutes on Limitations Contingent on Dying Without Issue.**—These statutes are: (1) Act of October 7, 1776, converting a fee tail into a “full and absolute fee simple” (9 Hen. Stat. 226. See § 40, *supra*); (2) Act taking effect January 1, 1820, making failure of issue definite (see § 225, *supra*); and (3) Act taking effect January 1, 1820, declaring in effect that any limitation that would be valid after an original fee simple shall be valid after a fee tail converted into a fee simple (abolishing the doctrine of *Carter v. Tyler*, 1 Call, 165). See Code Va. §§ 2421-’22. Let us now examine the following limitations at common law and under these statutes.¹

¹ ALTERATION OF LAW BETWEEN THE EXECUTION OF A WILL AND THE DEATH OF THE TESTATOR.—Upon the general question, see *Bigelow on Wills* (Student’s Series), 278-’9, where it is said: “The validity of the execution of a will is to be determined by the law in force at the testator’s death. A statute changing the requirements for execution is not open to the objection that it operates retrospectively, because the execution of the will has no force until the death of the testator. Again, if a statute should alter the effect of the dispositions made in a will, and the testator should allow the will to stand unchanged, it would be presumed, in England, that it was his intention that the will should operate according to the change in the law. *Hasluck v. Pedley*, L. R., 19 Eq. 271. But in some of our States it is held that, in regard to questions of property, the law which was in force when the will was executed is to be applied. Both views, no doubt, stand upon the ground of supposed intention of the testator.” When the law as it is at the *death* of the testator does not apply (as it does not by express provision of the Wills Act of 1 Vict. c. 26, § 34), it has been held that if a change of law as to the operation of a will is made between the date of the will (*i. e.*, the time of writing it) and its actual execution, it is to be construed according to the law in force at the time it was executed. *Randfield v. Randfield*, 8 H. of L. Cas. 225; 29 Am. & Eng. Ency Law, 355, note.

With reference to the Virginia statutes, referred to above, the act of October 7, 1776, abolishes estates tail without reference to the time of their creation, declaring that “every person who now hath, or hereafter may have, an estate in fee taille, general or

§ 227. Devise to A for Life, and if A Die without Issue, Remainder to B and His Heirs.

(1). *In Virginia, before October 7th, 1776.* Same as at common law. A has a fee-tail by implication, and B has a vested remainder in fee simple. See § 222, *supra*.

(2). *From October 7, 1776, to January 1, 1820.* A has

special, in any lands, . . . whether such estate tail hath been or shall be created by deed, will, act of assembly, or by any other ways or means, shall from henceforth, or from the commencement of such estate tail, stand *ipso facto* seised . . . of such lands . . . in full and absolute fee simple." 9 Hen. Stat. 226. See § 40, *supra*.

As to the two acts going into effect January 1, 1820 (the one making the failure of issue *definite*, and the other abolishing the doctrine of *Carter v. Tyler*), the language of 1 Rev. Code of 1819, chapter 99, §§ 25 and 26, makes it clear that both acts are applicable to wills *made* before January 1, 1820, if the testator *died* on or after that date. By § 25: "Every estate in lands which shall be limited by any deed hereafter made, or *by the will of any person who shall hereafter die*, so that, as the law was on the seventh day of October, in the year of our Lord one thousand seven hundred and seventy-six, such an estate would have been an estate tail, shall be deemed to be an estate in fee simple, in the same manner as if it had been limited by those technical words which, at the common-law, are appropriate to create an estate in fee simple; and every limitation upon such an estate shall be held valid if the same would be valid when limited upon an estate in fee-simple, created by technical language as aforesaid." The last clause of § 25 abolishes the doctrine of *Carter v. Tyler*. Then follows § 26, rendering the failure of issue definite, which begins thus: "Every contingent limitation in any such deed or will, made to depend on the dying of any person without heirs," etc. (For the statute as it now stands in the Code of 1887, § 2422, see § 225, *supra*.) What is meant by "any such deed or will?" Referring to § 25, it is plain that it means, "any deed hereafter made, or the will of any person who shall hereafter die," thus making the new law applicable if the testator *died* after the statute went into operation, regardless of the time of the execution of the will.

With regard to the Virginia Wills Act taking effect July 1, 1850, it is expressly provided by § 22 of ch. 122 of the Code of 1849, that, "The preceding sections of this chapter shall not extend to

a fee simple, the act of 1776 converting the implied fee-tail into a "full and absolute" fee simple. Then B's estate cannot be a remainder, because no remainder can follow a fee simple. Neither is it allowed to be an executory devise, by the doctrine of *Carter v. Tyler* (as to which, see below); and, if it could be allowed to be an executory devise, it would violate the rule against perpetuities, because it is to take effect after an *indefinite* failure of issue. So A takes the fee simple, and B takes nothing. *Tate v. Tally*, 3 Call, 354.

N. B. The doctrine in Virginia of *Carter v. Tyler*, as it is called, is the doctrine which declares that in no case can an executory devise follow a fee tail raised to a fee simple by the statute of 1776 abolishing estates tail, and converting them into estates in fee simple. For this doctrine two reasons are given, namely: (1) That before the statute operated on the fee tail, there was a moment of time when the limitation over after the fee tail was a remainder; and this remainder could not turn into an executory devise by matter *ex post facto*, for the maxim is, "Once a remainder, always a remainder" (see § 214, *supra*); and (2) That when the statute of 1776 declared that every estate tail should become a "full and absolute fee simple," it necessarily avoided an executory devise after a fee tail so converted; for the effect of an executory devise after a fee simple is to make the fee *defeasible* on the happening of the event on which the executory devise depends; and this is inconsistent with a *full and absolute* fee simple in the first taker. *Carter v. Tyler*, 1 Call 165; *McClintic v. Manns*, 4 Munf.

any will made before this act is in force; but the validity and effect of such will shall be determined by the laws in force on the day before this chapter takes effect, in like manner as if these laws, so far as they relate to the subject, were herein enacted in place of such sections. Every will re-executed or republished or revived by any codicil shall, for the purposes of this chapter, be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived." And see Code of 1887, § 2532. Also *Raines v. Barker*, 13 Grat. 128.

328; *Ball v. Payne*, 6 Rand. 73; *Bramble v. Billups*, 4 Leigh (90); *Callis v. Kemp*, 11 Grat. 78. See *Moore v. Brooks*, 12 Grat. 135.

(3). *From January 1, 1820, to the present time.* A has a life estate not enlarged to a fee-tail, because failure of issue is made *definite* by the act of January 1, 1820. And there are *two* remainders in fee upon a contingency with a double aspect, both of which remain contingent until the death of A, the one to the issue of A *living at his death, or born to him within ten months thereafter*, and the other to B. On A's death, if there is issue of A then living, etc., the first remainder vests in such issue, and the second is defeated; but if there is no issue of A, living at his death, etc., then the second remainder, to B, takes effect. See § 224, *supra*. The form of the limitation under the statute is, in effect, "To A for life; and if A die without issue *living at his death, or born to him within ten months thereafter*, then to B and his heirs." *Jiggetts v. Davis*, 1 Leigh (Va.) 419; *Wine v. Markwood*, 31 Grat. 43, 51; *Sutherland v. Sydnor*, 84 Va. 880. See *Warners v. Mason*, 5 Munf. (Va.) 242.

§ 228. **Effect of Definite Failure of Issue on Rule in Shelley's Case.—View of Professor Minor.**—It will be remembered that in the above limitation, "To A for life, and if A die without issue, remainder to B and his heirs," A takes at common law a *fee-tail* by the implication of a remainder to the issue of A, following A's express life estate, and the consequent operation of the Rule in Shelley's Case. For at common law the failure of A's issue is *indefinite*, and the word "issue" therefore embraces the whole line of A's issue, his whole inheritable blood, and "takes in all issues to the utmost of the family, as far as heirs of the body would do. It is therefore a word of limitation and not of purchase. 3 Jarm. Wills, 200; *Roddy v. Fitzgerald*, 6 H. of L. Cas. 882. But by the Virginia statute of 1820, the failure of issue is made *definite*, and the remainder implied in favor of the issue of A is confined to *issue living at the time of his death, or born to him within*

ten months thereafter; and this prescription of a definite time makes such issue a particular class as of that time, and the word "issue" becomes *descriptio personarum* and a word of purchase, instead of *nomen collectivum* and a word of limitation. Hence the Rule in Shelley's Case has no application, and cannot operate to enlarge the estate of A, which remains as previously limited.¹ See *Lethieullier v. Tracy*, 3 Atk. 784, 796; *Smith v. Chapman*, 1 H. & M. (Va.) 240, 292, 298; *Jiggetts v. Davis*, 1 Leigh (368), (418); *Nowlin v. Winfree*, 8 Grat. 346, 348; *Tinsley v. Jones*, 13 Id. 289, 296; *Cooper v. Hepburn*, 15 Id. 551; *Moon v. Stone*, 19 Id. 130, 232, 245; *Daniel v. Whartenby*, 17 Wall. 639; Va. Law Journal, April, 1880, article entitled, "Dying Without Issue Under Virginia Statutes"; Va. Law Journal, October, 1883, article entitled, "The Effect of a Definite Failure of Issue on the Operation of the Rule in Shelley's Case." See, however, 2 Min. Ins. 453-457 (3rd ed.), 458-462 (4th ed.), where it is contended that the statute of 1820, making the failure of issue definite, had no effect upon the implication of an estate tail; so that A's life estate is first raised to a fee tail, and then by the statute of 1776 is converted into a fee simple, after which the fee simple to B is good as an executory devise; and that

¹ The doctrines that estates tail continue to be created "as the law was aforetime," *i. e.*, on October 7, 1776, can have no application in this connection, because the statute of 1819 makes "die without issue," wherever it occurs, equal to "die without issue living at his death," etc.; and this limitation, as the law was aforetime, did not create an estate tail. For the extent of the doctrine referred to, see *Carter v. Tyler*, 1 Call, 165; *Hill v. Burrow*, 3 Id. 342; *Tate v. Tally*, *Ib.* 354; *Tidball v. Lupton*, 1 Rand. 194; *Goodrich v. Harding*, 3 Id. 280; *Bells v. Gillespie*, 5 Id. 273; *Ball v. Payne*, 6 Id. 73; *Jiggetts v. Davis*, 1 Leigh (368); *Bramble v. Billups*, 4 Id. (90); *Thomason v. Andersons*, *Ib.* (115); See *v. Craigen*, 8 Id. 449; *Tinsley v. Jones*, 13 Grat. 289. For a correct statement of the results of these cases, the reader is referred to 3 Lom. Dig. (211). For a clear explanation of the effect of the act of 1785, see opinion of Moncure, P., in *Tinsley v. Jones*, 13 Grat. 296-297.

this continued to be the law of Virginia until the statute of July 1, 1850, abolishing the Rule in Shelley's Case, after which A takes a life estate, followed by a contingency with a double aspect, as is explained above. But this doctrine of Professor Minor, as to the effect of the statute of 1820, is not sustained by authority, and is believed to be unsound in principle.¹

¹ THE IMPORTANCE OF THE CONSEQUENCES WHICH FLOW FROM THE OPPOSING VIEWS.—When the form of limitation is "*To A and his heirs*, and if he die without issue, to B," it can make no difference, since the legislation of 1819, abolishing the doctrine of *Carter v. Tyler*, and removing the objection of remoteness as to B's estate, whether A be considered to have a fee simple by original limitation, or a fee simple by first reducing the fee to a fee tail, by implication, and then restoring it to the dignity of a fee by virtue of the statute of 1776. *Corr v. Porter*, 33 Grat. 278. But it is far otherwise when the form of the limitation is, "*To A for life*, and if he die without issue, to B." For here, if A's life estate is enlarged, by implication, to a fee tail, and then made a fee by the statute, then if A die without issue living at his death, etc., the fee will shift to B, subject to a right of dower in favor of the widow of A; or, if A were a female, her husband would have curtesy, other requisites being present. *Jones v. Hughes*, 27 Grat. 560; *Medley v. Medley*, Ib. 568; *Corr v. Porter*, *supra*. But, of course, if A's estate remains for life only, there will be neither dower nor curtesy.

Again, while it is true that if there be *no* issue of A living at his death, etc., the land will go over to B, whether A be considered to have a life estate or a fee simple; yet the consequences, when there *is* issue of A, are by no means the same in the two cases. For if A have the *fee*, subject only to go over to B on the happening of the contingency, then when the contingency does *not* happen, A has an absolute fee, with which he can do what he wills. But if there be issue of A, when A has a life estate only, such issue, living at his death, etc., are entitled to the estate as purchasers, and their interest can in no wise be affected by any act of A's. *Wine v. Markwood*, 31 Grat. 50.

It may be remarked that the question which has been discussed may yet arise upon wills subject to the law as it was prior to July 1, 1850. For until the death of the tenant for life, when the contingency of dying without issue living at his death, etc., is decided, the statute of limitation does not begin to run; and as

§ 229. Devise to A and His Heirs, and if A Dies Without Issue, Remainder to B and His Heirs.

(1). *In Virginia before October 7, 1776.* Same as at common law. A has a fee-tail, by implication, and B has a vested remainder. See § 223, *supra*.

(2). *From October 7, 1776, to January 1, 1820.* A has a "full and absolute" fee simple by the effect of the statute of 1776 on the estate tail created by implication. B's estate is void as a *remainder*, since no remainder can follow a fee simple; and as an executory devise it cannot be allowed because of the doctrine of *Carter v. Tyler*; and besides it would violate the Rule against Perpetuities because of the indefinite failure of issue. *Hill v. Burrow*, 3 Call, 342; *Eldridge v. Fisher*, 1 H. & M. 559; *Sydnor v. Sydnors*, 2 Munf. 263; *Bells v. Gillespie*, 5 Rand. 273; *Broaddus v. Turner*, 5 Id. 308; *Tinsley v. Jones*, 13 Grat. 289; *See v. Craigen*, 8 Leigh, 449.

(3). *From January 1, 1820, to the present time.* A has a fee simple, and B has a good executory devise of a fee after a fee. A's fee simple is by the original limitation to him and his heirs, and not by the effect of the statute of 1776 on an estate tail. For as the failure of issue is now definite, no estate tail can be raised by implication; and the fee simple to A remains a fee simple. And the executory devise to B does not violate the Rule against Perpetuities, because the failure of issue is *definite*, and B is to take if A has no issue *living at his death*, or born within ten months thereafter. See *Corr v. Porter*, 33 Grat. 278; *Randolph v. Wright*, 81 Va. 608; *Pettyjohn v. Woodroof*, 77 Va. 507; *Tomlinson v. Nickell*, 24 W. Va. 148.

N. B.—It should be observed that if in a devise since

the first taker may be an infant at the death of the testator, litigation may be thus postponed for many years. In the case of *Pettyjohn v. Woodroof*, 77 Va. 507, the testator died in 1822, but as the first taker lived until 1875, a suit commenced in 1877 was in time.

January 1, 1820, the form of limitation is, "To A, and if A die without issue, to B and his heirs," this is in effect, "To A and his heirs (see § 36, *supra*), and if A die without issue, to B and his heirs." See *Tinsley v. Jones*, 13 Grat. 289, 297; *Jones v. Hughes*, 27 Grat. 560; *Medley v. Medley*, 1b. 568; *Wine v. Markwood*, 31 Grat. 43. And the law is the same now in England since 1837. 2 Jarm. Wills. 144.

§ 230. Devise to A and the Heirs of His Body; and if A Die Without Issue, then to B and His Heirs.

(1). *In Virginia before October 7, 1776.* A has a fee tail by express limitation; B has a vested remainder, to take effect whenever the issue of A fails, whether at A's death or at any subsequent time. Gray, Perp's, § 111.

(2). *From October 7, 1776, to January 1, 1820.* A has a "full and absolute" fee simple by the operation of the statute of 1776 upon the express fee tail. B takes nothing. The limitation over to B cannot be good as a remainder, for it follows the fee simple to A; and as an executory devise, it is void by the doctrine of *Carter v. Tyler*, and also because it would violate the Rule against Perpetuities, being limited to take effect after an *indefinite* failure of issue. *Hunter v. Haynes*, 1 Wash. (Va) 292; *Tidball v. Lupton*, 1 Rand. 194.

(3). *From January 1, 1820, to the present time.* A has a fee simple by the operation of the statute of 1776 upon his express fee tail; B has a good executory devise of a fee on a fee, the doctrine of *Carter v. Tyler* having been abolished in 1820, and the failure of issue made definite. It is, therefore, allowed to be an executory devise; and, as such, it does not violate the Rule against Perpetuities.

N. B.—When a devise is "To A and the heirs of his body," or "To A and his issue," with a limitation over after a *definite* failure of issue ("if A die without issue *living at his death*," *e. g.*). the only effect of the definite failure of issue is to make *the limitation over contingent* upon such failure; and the words "if he die without issue living at his

death," etc., are not considered explanatory of the species of issue included in the *prior devise*, and, therefore, do not prevent the prior devisee from taking an estate tail under it. 3 Jarm. Wills 239; *Ellys v. Wynne*, 22 Grat. 224; *Atkinson v. McCormick*, 76 Va. 791; *Stokes v. Van Wyck*, 83 Va. 724. But while a definite failure of issue does not affect an *express* estate tail previously limited, it prevents the *implication* of an estate tail, when the previous estate is for life or in fee simple; for the words "issue living at his death," etc., are either words of *purchase* or of *contingency*, and not words of *limitation*; and only words of limitation can enlarge or reduce the express estate previously limited. See § 224, *supra*.

§ 231. Devise to A and the Heirs of His Body; and if A Die Without Issue Living at His Death, then to B and His Heirs.

(1). *In Virginia before October 7, 1776.* A has a fee tail by express limitation, and B a contingent remainder under Fearn's First Class, by reason of the contingent determination of A's estate tail. For the testator has made the failure of A's issue definite, so that the words "if A die without issue living at his death" are words of contingency; and B is to take only if no issue be living at A's death, and not on the *subsequent* failure of A's issue.

(2). *From October 7, 1776, to January 1, 1820.* A's express fee tail is converted into a "full and absolute fee simple," as we have seen, after which no executory devise can follow, by the doctrine of *Carter v. Tyler*. B's estate cannot be a remainder after the fee simple; and as *Carter v. Tyler* does not allow it to be an executory devise, it is void. This was the form of limitation in *Carter v. Tyler*, 1 Call, 165. See *Broadbuss v. Turner*, 5 Rand. 317.

(3). *From January 1, 1820, to the present time.* A has a fee simple, and B has a good executory devise, the doctrine of *Carter v. Tyler* having been abolished January 1, 1820. See § 226, *supra*. B's executory devise is not too

remote, as it must take effect, if ever, at the *death* of A having no issue *then* living.¹

§ 232. **Executory Limitations Before and After January 1, 1820.**—It is manifest that January 1, 1820, is an epoch in the history of executory limitations in Virginia depending on dying without issue. Before that date, either the indefinite failure of issue or the doctrine of *Carter v. Tyler* made the limitation over void; but when, by the act of 1820, the failure of issue became definite, and the doctrine of *Carter v. Tyler*

¹ *CARTER V. TYLER*.—As to the doctrine of *Carter v. Tyler*, it may be observed that it applied to every case where the first estate was an estate tail, rendering the limitation over void after such estate tail converted by the act of October 7, 1776, into a fee simple. It follows that although estates tail ceased to be *raised by implication* in Virginia after the act of 1819, taking effect January 1, 1820, changing the meaning of “dying without issue” from an indefinite to a definite failure of issue, yet the doctrine of *Carter v. Tyler*, if it had not been abolished, would have still applied where the first taker had an estate tail, by *express limitation*, not dependent on the effect of the words “dying without issue.” *Carter v. Tyler* was itself a case of this kind, the devise being, “To W. C. and his heirs lawfully begotten,” which words of themselves created an estate tail. See 3 Jarm. Wills, 91, and cases cited, and *Broaddus v. Turner*, 5 Rand. 317, opinion of Coalter, J. Judge Carr, however, thought these words gave a fee simple to W. C., which was reduced to a *fee tail* by the limitation over after an *indefinite* failure of issue. See his opinion in *Bells v. Gillespie*, 5 Rand. 280–82, and in *Broaddus v. Turner*, *Ib.* 309. It seems, however, that Judge Carr was mistaken in supposing that the words, “To W. C. and his heirs lawfully begotten,” in the devise in *Carter v. Tyler*, gave W. C. the fee simple by *express limitation*. And as to the failure of issue in that case, while there was no decision on that point by the court, yet it was assumed by counsel on both sides to be *definite*, as otherwise the limitation over would have been clearly void for remoteness, without reference to the questions discussed by counsel and decided by the court.

In *Elys v. Wynne*, 22 Grat. 224 (see § 232, *infra*), the limitation in the will of a testator who died in 1833 was, “To D and the heirs of her body, but if she die without such heir, then over.” Here there was an estate tail created by express words,

was abolished, such executory limitations became valid, and have greatly flourished ever since. A good example of the effect of the acts of 1820 is furnished by the case of *Elys v. Wynne*, 22 Grat. 224. (See § 231, *supra*, note.) In 1833 the testator made his will and died. He devised land to D and the heirs of her body; but should D die without heir as above mentioned, then the land to be sold, and the money equally divided among all his heirs. *Held*, D took a fee simple in the land defeasible on her without such heir living at her death or born to her within ten months thereafter, in which case the other heirs of the testator would take. Had the devise been subject to the law before 1820, the limitation over would have been void. For Tabular View, see *infra*, p. 284.

converted by the statute of 1776 into a fee simple; and a limitation over after a *definite* failure of issue. But this limitation would have been rendered void by the doctrine of *Carter v. Tyler*, had that doctrine continued in force. It was not enough, therefore, by the legislation of 1819, to make the failure of issue *definite*, as this only made good the limitation over after what would otherwise have been an estate tail *by implication*; but it was also necessary to declare, as was done by the other statute of 1819, that any limitation which would be good after a fee simple originally limited should be good after any fee tail converted by the act of 1776 into a fee simple, thus effectually abolishing the doctrine of *Carter v. Tyler*.

It may be remarked that when the first taker is a woman (see *Elys v. Wynne*, *supra*), in order that there may be issue born to her after her death, it is necessary to suppose (if indeed the Cæsarean operation be not performed) that she had a son who married and died in her lifetime, leaving his wife *enceinte* of a child, whose birth takes place after the death of the first taker, its grandmother. Such a case is put by Judge Carr in *Thomason v. Andersons*, 4 Leigh (125).

EFFECT OF LIMITATIONS OVER AFTER DYING WITHOUT ISSUE.

FIRST PERIOD.—At common law and in Virginia before October 7, 1776.	SECOND PERIOD.—In Virginia from October 7, 1776, to January 1, 1820.	THIRD PERIOD.—In Virginia from January 1, 1820, to the present time.
<p>I.—Devise to A</p> <p>A has a fee tail by implication; and B has a vested remainder. See § 227, (1). Also, § 222.</p>	<p>for life; and if A die without issue, A has a "full and absolute" fee simple. B takes nothing. See § 227, (2).</p>	<p>to B and his heirs.</p> <p>A has a life estate, followed by a contingency with the double aspect. See § 227, (3); also § 228.</p>
<p>II.—Devise to A and</p> <p>A has a fee tail by implication; and B has a vested remainder. See § 229, (1). Also, § 223.</p>	<p>his heirs; and if A die without issue, A has a "full and absolute" fee simple. B takes nothing. See § 229, (2).</p>	<p>to B and his heirs.</p> <p>A has a fee simple; and B has a good executory devise of a fee after a fee. See § 229, (3).</p>
<p>III.—Devise to A and the</p> <p>A has a fee tail by express limitation; and B has a vested remainder. See § 230, (1).</p>	<p>heirs of his body; and if A die with A has a "full and absolute" fee simple. B takes nothing. See § 230, (2).</p>	<p>out issue, to B and his heirs.</p> <p>A has a fee simple; and B has a good executory devise of a fee after a fee. See § 230, (3).</p>
<p>IV.—Devise to A and the heirs of his</p> <p>A has a fee tail by express limitation; and B has a contingent remainder. See § 231, (1).</p>	<p>body; and if A die without issue liv A has a "full and absolute" fee simple. B takes nothing. See § 231, (2).</p>	<p>ing at his death, to B and his heirs.</p> <p>A has a fee simple; and B has a good executory devise of a fee after a fee. See § 231, (3).</p>
Period of remainders.	Period of void limitations over.	Period of valid limitations over.

§ 233. **Executory Interests in Personalty.**—In 2 Jarman, Wills (5th Am. ed.), 501, it is said: “No remainders can be limited in real and personal chattels; every future bequest of which, therefore, whether preceded by a partial gift or not, is, in its nature, executory.” The reason is, that the common law doctrine as to *estates* in land was held inapplicable to chattels, in which the law recognized nothing but absolute ownership: so that a gift to A of a chattel, real or personal, vested in A the entire interest; and the result was the same if the gift was to A for life, or otherwise. In each case A, at law, was the absolute owner; there was no reversion in the donor, and a remainder over to a third person was void—just as in land there can be no remainder after a feoffment in fee simple. See Fearne, *Remainders*, (3), n. (c); also (401); 2 Bl. Com. (174); Wms. Real Prop. (6th Am. ed.), 291; Wms. Pers. Prop. (4th Am. ed.) (7), (259); Gray, *Perpetuities*, § 117; 2 Min. Ins. (4th ed.), 433; 20 Am. & Eng. Ency. Law, 908, 930.

In his definition of an executory devise, Fearne (p. 385) includes a future estate in *personalty* (though stating that it is more properly an executory *bequest*), and declares it to be “such a future estate in lands or chattels . . . as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law.” (See § 206, *supra*.) And on page (401) he says: The third sort of executory devises, comprising all that relate to chattels, is where a term for years, or any personal estate, is devised (more properly, bequeathed) to the one for life, or otherwise; and after the decease of the devisee or legatee for life, or some other contingency or period, is given over to some one else. Such ulterior limitation was void at common law, and the whole property vested in the person to whom it was limited for life; though there was, indeed, a distinction taken between a devise (or rather, bequest) of the *use* of a personal thing and of the thing itself. Thus where the will was that A should use such a thing during

his life, and afterwards that B should have it, the limitation over was agreed to be good; but if the first disposition had been of *the thing itself* to one for life, and after to another, then the devise over would have been void. But the doctrine has gradually obtained, and is now settled, that such limitations over in a will, or by way of trust, are good." For an example of a future estate in personalty by will, see *Pettyjohn v. Woodroof*, 77 Va. 507. But there can be no future estate in chattels which are consumed in the using—*quæ ipso usu consumuntur*, as wines, etc. See *Wms. Pers. Prop.*, 262; 2 Min. Ins. 434; *Dunbar v. Woodcock*, 10 Leigh, 628.

It will be noticed that Fearné does not say that a future interest in chattels may be created by way of *use*, but by way of *trust*. The reason is that the statute of uses has no application to personal property. 2 Bl. Com. (336); Gray, *Perpetuities*, § 73, § 79; 20 Am. & Eng. Ency. Law, 933; § 114, *supra*. Nor does Fearné state that a future interest in chattels can be created by deed otherwise than by way of trust. And this is in conformity with the law as it is still held in England. *Wms. R. P.* (6th Am. ed.), 292; *Wms. Pers. Prop.* (4th Am. ed.), 261; Gray, *Perpetuities*, §§ 76, 78; 20 Am. & Eng. Ency. Law, 934. But in the United States it is said that "the weight of authority sustains the position that future limitations of chattels, real or personal, may be created by deed as well as by will, without the intervention of trustees; and that under such limitations both the life legatee and the ulterior legatee take legal, as distinguished from equitable, interests." 20 Am. & Eng. Ency. Law, 934. And see *Carney v. Kain*, (W. Va.), 23 S. E. 650, 656; 2 Min. Ins. (4th ed.), 433-'34. For full discussion, see Gray, *Perpetuities*, §§ 71-98, where the conclusion is reached that in the United States, with the exception of North Carolina, *legal* future estates in personalty can be created by deed *inter vivos*.¹

¹ FUTURE ESTATES AN PERSONALTY.—In *Wms. Pers. Prop.* (267),

§ 234. Executory Interests Under Virginia Statutes—The policy in Virginia is to allow the same limitations *directly*

it is said: "As no estates can subsist in personal property, it follows that the rules on which contingent remainders in freehold lands depend for their existence have never had any application to contingent dispositions of personal property. Such dispositions partake rather of the indestructible nature of the executory devises and shifting uses. . . . If, therefore, a gift be made of personal property to trustees, in trust for A for his life, and, after his decease, in trust for such son of A as shall first attain the age of twenty-one years; or if a term of years be bequeathed to A for his life, and after his decease, to such son of A as shall first attain the age of twenty-one years; it will be immaterial whether or not the son attain the age of twenty-one in the lifetime of his father. On his attaining that age, he will become entitled quite independently of his father's interest. His ownership will spring up, as it were, on the given event of his attaining the age. But as the indestructible nature of these future dispositions of personal estate might lead to trusts of indefinite duration, the rule of perpetuities, which confines executory interests [*i. e.*, the *arising* of such interests] within a life or lives in being, and twenty-one years afterwards, with a further allowance for the time of gestation, should it exist, applies equally to personal as to real estate." And see, as to the application of the rule against perpetuities to future estates in chattels. Gray, Perpetuities, § 117; also §§ 319-321.

It may be further remarked, with reference to limitations of personalty, that there are no estates-tail in chattels, whether personal or real; and the words which create an estate-tail in land, whether expressly or by implication, confer the whole interest in personalty; *i. e.*, an interest corresponding to a fee simple estate in realty. Fearne, Remainders (463); Wms. Pers. Prop. (264); 3 Jarm. Wills, 374. Hence, a gift of personalty to A and the heirs of his body, followed by a limitation over to B, on the indefinite failure of the issue of A, gives A the whole interest, and the limitation over to B, is void as violating the rule against perpetuities; whereas, in the same case, as to realty, A would have a fee tail, and B a vested remainder. But in a gift of personalty, "To A and the heirs of his body, and if A die without issue *living at his death* (or other words, which make the failure of the issue definite), then to B," the limitation to B is good, as it cannot violate the rule against perpetuities. See Fearne (470),

by deed which were formerly good only by way of executory use or executory devise. See §§ 210-'12, *supra*.

(1). Statute taking effect January 1, 1820: "Any estate may be made to commence *in futuro* by *deed* in like manner as by *will*." 1 Rev. Code of 1819, ch. 99, § 28; Code of 1887, § 2418. So by *any deed* in Virginia a *freehold* can commence *in futuro*.

(2). Statute taking effect July 1, 1850: "Any estate which would be good as an *executory devise* or *bequest*

(477); Hawkins, Wills, 208; *Wilkinson v. South*, 7 T. R. 555. And because of the fatal effect of an indefinite failure of issue on a limitation over of personal property, we are told by Fearne (476), that "courts in the case of personal estate generally incline to pay attention to any circumstances or expression in the will that seems to afford a ground for construing a limitation after dying without issue, to be a dying without issue living at the death of the party, in order to support the devise over." It has resulted that the rules of construction are not in all cases the same, as to definite and indefinite failure of issue, in wills of realty and personalty; and some expressions which make a definite failure of issue as to personalty are insufficient for that purpose as to realty. For review of Virginia cases, see 1 Tuck. Com., Book II., 158-161; 2 Min. Ins. 442-'43.

It should be added, that, by analogy, the Rule in Shelley's Case has been held to operate upon gifts of personal property where the requisites are present which would render it applicable in a conveyance of realty; so that, for example, a gift of a term of years to A for life, remainder to the heirs of his body, gives A the absolute property by the Rule in Shelley's Case, and the heirs of his body take nothing. Fearne (491); Wms. Pers. Prop. (267); 3 Jarm. Wills (376); 2 Min. Ins. (4th ed.), 407; 22 Am. & Eng. Ency. Law, 512; 11 Am. St. R. 106, note; *Hughes v. Nicklas* (Md.), 14 Am. St. R. 377. But the rule is not so imperative as to personalty as it is in limitation of realty; and it will yield to evidence of intention, apparent on the face of the will, that the words "heirs," "issue," etc., are intended as words of purchase. See Gray, Perpetuities, § 647, n. 3; *Ex parte Wynch*, 5 De G. M. & N. 188; *Smith v. Butcher*, 10 Ch. D. 13. In Virginia, the Rule in Shelley's Case has been abolished as to personalty by the same statute which abolished it as to real estate. See § 139, *supra*.

shall be good if created by deed." Code 1849, ch. 116, § 5; Code 1887, § 2428. This statute destroys the distinction between devises and deeds as to the validity of executory interests, and sanctions the doctrines of executory *devises* and bequests as equally applicable to *deeds*; thus permitting a *fee on a fee* by way of a deed, and validating by deed without uses the other limitations which were formerly void except when found in a will, or in a deed by way of use.¹

¹ EXECUTORY INTERESTS IN VIRGINIA.—Besides the statutes mentioned in the text, two other statutes may be considered as to their effect on executory interests in Virginia:

1. Act of January 1, 1787 (the Virginia Statute of Uses), giving effect to the deeds of bargain and sale, lease and release and covenant to stand seised to use, and declaring that "the possession [*i. e.*, legal title] of the bargainor, releasor or covenantor, shall be deemed transferred to the bargainee releasee or person entitled to the use, as perfectly as if the bargainee, releasee or person entitled to the use had been enfeoffed with livery of seisin of the land intended to be conveyed by such deed or covenant." Code Va., § 2426. For full text and explanation of the statute, see § 116, *supra*. Under this statute, by bargain and sale or covenant to stand seised, it seems (1) that a freehold could be made to commence *in futuro* before the Act of 1820, above cited, declaring that "any estate may be made to commence *in futuro* by deed in like manner as by will"; and (2) that a fee could be limited on a fee before the act of July 1, 1850, above cited, declaring that "any estate which would be good as an executory devise or bequest shall be good if created by deed." See *Gray, Perpetuities*, §§ 55–66; 2 Min. Ins. (4th ed.) 431, 808, 905; *Camp v. Cleary*, 76 Va. 140; *Ocheltree v. McClung*, 7 W. Va. 232.

2. Act of July 1, 1850, declaring that "all real estate, as regards the conveyance of the immediate freehold thereof, shall be deemed to lie in grant as well as in livery." Code Va., § 2417; § 117, *supra*. Under this statute it seems that, by deed of grant, a freehold can be made to commence *in futuro* without the aid of the act of 1820; and that a fee could be mounted on a fee, even if the statute of July 1, 1850, had not been enacted, declaring that "any estate which would be good as an executory devise or bequest shall be good if created by deed." See 2 Min. Ins. (4th ed.) 779, where it is said: "Under the statute of grants, by means of a grant an estate of freehold in lands may be made to com-

mence at a future time, and an estate in fee simple, after having become vested, may be made to shift, upon the occurrence of a future contingency, from one to another, as at common law could not be done at all; and before this statute could be done only by means of wills, and very imperfectly with us by means of the conveyances under the statute of uses [but see, as to a freehold to commence *in futuro*, the statute of 1820]; the statute of grants thus introducing a new class of executory or future limitations, namely, executory or future *grants*, in addition to executory or future *devises* and executory or future *uses*." See, also, 2 Min. Ins. 430, §27; Gray, *Perpetuities*, §§ 67, 68. For the doctrine of *ut res magis valeat quam pereat*, as applied to deeds of grant, see § 118, *supra*.

CHAPTER XII.

POWERS.

I.—*Powers of Appointment over Property.*

§ 235. **Definition.**—A power of appointment is an authority conferred on a person enabling him to dispose of an interest vested either in himself or in some third person. Bispham's Eq. (5th ed.) § 256; 18 Am. & Eng. Ency. Law (1st ed.), 878, n. 1; *Burleigh v. Clough* (N. H.), 13 Am. Rep. 23, 26; Hopkins Real Prop. 308. A power is not absolute property, nor an estate, but *authority to appoint an estate; i. e.*, to indicate to whom it shall pass. Powers of appointment operate on the legal title in England under the Statute of Uses and the Statute of Wills; and in Virginia under the Statute of Wills and the Statutes of Grants. 2 Min. Ins. 820; Wms. R. P. (294).

§ 236. **Example of a Power Under the Statute of Uses.**—Suppose X conveys land to A and his heirs, to such uses as B shall by any deed or by his will appoint; and in default of and until such appointment by B, to the use of C and his heirs. Now let B exercise the power by deed or by will in favor of D. Then the use appointed to D is executed by the Statute of Uses, and D has the legal title, which shifts to him from C, who was entitled until appointment by B. In the above example the parties are named as follows: X is the donor of the power, *i. e.*, its giver and creator; A is the feoffee to uses (reservoir of seisin); B is the donee of the power, who, by its exercise, becomes the appointor; C is the person entitled until and in default of appointment by B; and D is the appointee, *i. e.*, the person who takes by and under B's appointment. Wms. R. P. (294).

§ 237. Example of a Power Under the Statute of Wills.—X devises his land to his widow for her life, and authorizes her to appoint by her will the said land to his children in such shares as she shall see fit; and in default of such appointment, he directs that the land be divided equally among his children. Here X is the donor of the power; his widow is the donee, and becomes the appointor in case she appoints; X's children are the *objects* of the power, *i. e.*, the class among whom the appointment *may* be made; and when it is made to them, they become the appointees; and those who are entitled *in default of appointment* are all the children equally. See *Rhett v. Mason*, 18 Grat. 541; *Morriss v. Morriss*, 33 Grat. 51; *McCamant v. Nuckolls*, 85 Va. 331. For an example of a life estate *by deed*, with power of appointment, see *Norris v. Woods*, 89 Va. 873.¹

¹ INTENTION TO EXECUTE A POWER.—In *Lee v. Simpson*, 134 U. S. 572, 589, the court says: "The question of the execution of a power is fully discussed by Mr. Justice Story in *Blagge v. Miles*, 1 Story, 426. The rule laid down in that case is, that if the donee of the power intends to execute it, and the mode is in other respects unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative; that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation, but if it be doubtful under all the circumstances, then that doubt will prevent it from being deemed an execution of the power; and that it is not necessary, however, that the intention to execute the power should appear by express terms, or recitals in the instrument, but it is sufficient that it appears by words, acts, or deeds, demonstrating the intention.

"Judge Story states, as the result of the English authorities, that three classes of cases have been held to be sufficient demonstrations of an intended execution of a power: (1) Where there has been some reference in the will or other instrument to the power; (2) Or a reference to the property which is the subject on which it is to be executed; (3) Or where the provision in the will, or other instrument, executed by the donee of the power,

§ 238. **The Several Kinds of Powers.**—(1) The donee may have a *general* power to appoint to any person whatsoever, or it may be *special*, as to appoint to or among a particular class, *e. g.*, children only, or children and grandchildren, etc. But though the power is special as to the *class*, the donee may have discretion as to *the shares*; or he may be authorized to appoint, if he chooses, *all* to any

would otherwise be ineffectual, or a mere nullity; in other words, it would have no operation except as an execution of the power. The rule thus stated was referred to with approval by this court in *Blake v. Hawkins*, 98 U. S. 315, 326, and in *Warner v. Connecticut Mutual Life Ins. Co.*, 109 U. S. 357, 366; by the Court of Appeals of New York in *White v. Hicks*, 33 N. Y. 383, 392; and by the Supreme Court of Illinois in *Funk v. Eggleston*, 92 Ill. 515, 538, 539, 547 [34 Am. Rep. 136]. See, also, *Meeker v. Breintnall*, 38 N. J. Eq. 345." And see *Walke v. Moore*, 95 Va. 729.

As to the third class of cases, *supra*, viz.: where the instrument would have no operation except as an execution of a power, Jarman (2 Jarm., Wills, 5th Am. ed. 273), thus lays down the rule in England prior to the Wills Act of 1 Victoria, taking effect January 1, 1838: "Thus if a testator, by a will made before, and not republished on or since the first of January, 1838, devises all his hereditaments, or real estate, and it appears that he had no real estate at the time of its execution, but that he had a testamentary power over real estate, the devise will operate as an appointment under such power. On the other hand, if the testator had real estate on which the will could operate, it will be presumed that the devise was made with reference to such property, and not as an exercise of the power." And see 18 Am. & Eng. Ency. Law, 930, and notes. But this is now changed by statute in England and Virginia, and a general devise of real or personal property operates as the exercise of a power of appointment, unless a contrary intention shall appear by the will. For the English statute (1 Vict., c. 26, § 27), see 2 Jarm., Wills, 279. The Virginia statute is based on the English, and is as follows (C. V., § 2526): "A devise or bequest shall extend to any real or personal estate (as the case may be) which the testator has power to appoint as he may think proper, and to which it would apply if the estate were his own property; and shall operate as an execution of such power, unless a contrary intention shall appear by the will." The words, "as he may think proper," refer to

one of the class. See *McCamant v. Nuckolls*, 85 Va. 331; *Thrasher v. Ballard*, 35 W. Va. 524; Bisph. Eq. § 256.¹

the extent of the power as regards the objects, and not to the mode in which it is to be exercised, as, *e. g.*, by will only, and not by deed. 2 Jarm., Wills, 281; *Machir v. Funk*, 90 Va. 284. It is also held in *Machir v. Funk* to be an established common law rule that when a power is authorized to be executed on a contingent event, it may, unless contrary to the intention of the party creating it, be executed before (though it cannot take effect until) the contingency happens. 1 Sugden, *Powers*, 332. See *Thorndike v. Reynolds*, 22 Grat. 21.

¹ ILLUSORY APPOINTMENTS.—In Williams, *Personal Property* (4th Am. ed.), 271, it is said, speaking of a power of appointment to children: "Formerly [*i. e.*, in England] if such a power was so worded as not to authorize an exclusive appointment to some or one of the children, it was held by the Court of Chancery, as a rule of equity, that each child ought to have a substantial share; and an appointment to any child of a very small share was called an *illusory appointment*, and was held void. But this doctrine having given rise to difficulties and family disputes from the uncertainty of the question, what was too small or what was a sufficient share, the meddlesome doctrine of equity on this point was, a few years ago, abolished by act of Parliament (1 Wm. IV., c. 46); and now the appointment of any share, however small, cannot be set aside on the ground of its being illusory. The act extends, as did the doctrine, to real estate as well as personal; but landed property, from its nature, is seldom cut up into little portions."

But the "meddlesome doctrine of equity," above described, has not been abolished in the United States; and when the power is to appoint among a certain class, or in any manner which does not indicate the power of selection of certain objects to the exclusion of others, *all* must have *something*, and the gift to one or more of the class of *next to nothing* will be held illusory and invalid. And when an exclusive appointment is not authorized, an appointment by which an object of the power is entirely excluded will be, *a fortiori*, void. And this is still true in England since the statute abolishing the doctrine of illusory appointments. See Wms. Pers. Prop. (271), and Am. notes; *Alcyn v. Belchier*, 1 Lead. Cas. Eq. 400; 2 Min. Ins. (4th ed.), 820; 18 Am. & Eng. Ency. Law, 974; *Knight v. Yarbrough*, Gilmer (Va.) 27; *Rhett v. Mason*, 18 Grat. 541, 567.

(2). The power may be a power *in trust*, which the donee *must* exercise in favor of the objects. Here he is a donee-trustee; and *not to exercise the power* will be a breach of the trust. Such donee-trustee may have discretion as to the shares to be appointed; but if he fails *altogether* to appoint, a court of chancery will divide the property among the objects equally, since "*equality is equity*." See Bisph. Eq., § 77; 2 Pom. Eq. § 1002; 1 Perry on Trusts, § 248; *Mitchells v. Johnsons*, 6 Leigh, 461; *Atwood v. Shenandoah, etc., R. Co.*, 85 Va. 966, 993.

(3). The power may be a *naked* power, *i. e.*, a power not coupled (or clothed) with a trust. Such a power is also called a *mere* power, because it is a *power* merely, without the element of *trust*. Such a mere power not in trust is, as to its exercise, discretionary with the donee; and if he makes no appointment at all, a court of chancery will not interfere in favor of those who *might* have been the appointees. See 2 Pom. Eq., § 920.

§ 239. **Fraud on a Power.**—If a power is not exercised in good faith, and for the purpose for which it was created, such an exercise will be deemed a *fraud on the power*, and will be set aside in equity on a bill filed by a party in interest, *i. e.*, by a party entitled in default of appointment. *Aleyn v. Belchier*, 1 Lead. Cas. in Eq. (377) note; 6 Am. St. R. 885, note. If the power be a power *in trust*, its improper exercise is, of course, relieved against in equity in favor of the beneficiaries, as in any other case of breach of trust. But though a power be a *mere* power, and not in trust, and though the donee has a discretion whether he shall appoint or not, yet if he *does* appoint, he may do so in such a manner as to commit a fraud upon the power. This is where he is restricted by the terms of the instrument conferring the power as to the persons to or among whom he may appoint, or in respect to other material matters. Here, if he appoints in disregard of the restrictions, the appointment will be set aside. And this will also be

done when he makes a corrupt appointment to an *object* of the power, in order to acquire a benefit for himself, either directly or indirectly. See Bisph. Eq., § 256; Wms. Pers. Prop. (4th ed.) 475. But if the power is not in trust, and the donee has absolute discretion as to the persons to whom he may appoint, and as to the shares, he cannot commit a fraud on such power, because it could not be said that he had violated the intention of the donor. Indeed, in such case, he would have a right to appoint himself. Wms. R. P. (294); 2 Pom. Eq., § 920. For an example of an appointment void, because not to an *object* of the power, see *Hood v. Haden*, 82 Va. 588, where, under a power to appoint to *children*, the appointment was made to the *issue* of a child. See *Morris v. Owen*, 2 Call, 520; *Hudsons v. Hudsons*, 6 Munf. 362.

§ 240. Aider in Equity of the Defective Execution of a Power.

(1). What powers aided?

(a). If the power be *in trust*, and the donee either fails altogether to exercise it, or exercises it defectively, equity will relieve by way of enforcing the trust. See Bisph. Eq. § 195.

(b). If the power is not in trust (a *mere* power), then, as the donee is under no obligation to exercise it, if he omits altogether to do so, equity will not interfere. This is what is meant by saying that the *non-execution* of a power will not be aided in equity.

(c). But though the power is a *mere* power, and its exercise discretionary with the donee, yet if he has *attempted* to exercise it, and thereby shown his *intention* to appoint, equity will not suffer the appointment to fail because the formalities prescribed by the donor of the power as to the mode of its exercise have not been fully complied with. It is otherwise *at law*, where a power not *duly* exercised is considered as not exercised *at all*. And even in equity the

doctrine of *aider* of the defective execution of a power is carefully circumscribed.

(2). What defects aided in equity? Only those of *form*, not those of substance. *Freeman v. Eacho*, 79 Va. 43. And it is considered a *formal* defect if the instrument of exercise has a *less* number of witnesses than the donor prescribed, but not if, when required to be attested, there are *no witnesses at all*. See *Justis v. English*, 30 Grat. 565. If a power is required to be exercised by *deed*, its exercise by *will* is considered a formal defect, and is aided in equity; for what one may do *up to* death by *deed*, may well be done *at* death by *will*. But if the exercise is required to be by *will*, then its exercise by *deed* is a *substantial* defect, and equity will not aid; for in this case it is contemplated that the donee shall have the power of revocation and change *until he dies* (a will being ambulatory), and this is prevented by a deed. Bisph. Eq., p. 249, note (a). And the power to appoint to females in trust, and to their separate use, is not aided, and fails even in equity, if the appointment to them is of legal estates not to their separate use. See *Morriss v. Morriss*, 33 Grat. 51.¹

¹ WILL FOR DEED IN THE EXERCISE OF A POWER.—In *Hood v. Haden*, 82 Va. 588, 592, it is said: "Upon this point the law is very exact, and the cases uniformly hold that all the forms and conditions annexed to the exercise of a power must be strictly complied with. Thus, if a deed be required, the power cannot be executed by a will; and if a will be required, that mode alone will suffice." And see this language reproduced in *Gaskins v. Finks*, 90 Va. 384, 385.

In each of the above cases (as also in that of *Doe v. Thorley*, 10 East, 438, cited by the court), the power was authorized to be exercised *by will*, and the attempt to exercise it *by deed* was properly held invalid, for the reasons stated in the text. But the converse proposition laid down, that a power authorized to be exercised by deed cannot be exercised by will, is a *dictum* merely; and if it is meant that such execution is a defect of substance, *and cannot be aided in equity*, it is contrary to all the authorities. See 1 Lead. Cas. in Eq. 365 (note to *Tollett v. Tollett*); 1

(3). In whose favor aided? The appointee must be a *purchaser* from the donee; or a creditor whose debt is to be paid or secured (*Freeman v. Eacho*, 79 Va. 43, 47); or there must be a *meritorious* consideration, as in the case of an appointment to a wife, child, or charity. *Morriss v. Morriss*, *supra*; 2 Pom. Eq., § 589; Wms. R. P. (299).

(4). Against whom aided. Equity will not aid if the person entitled *in default* of appointment has as high a claim as the attempted appointee. Thus equity will aid a *bona fide* purchaser against the heir at law or remainderman, but not a grandchild against a child, nor, it is presumed, one charity against another. For *at law* the *informal* appointment is void, and hence the legal title is in him who is entitled *in default of* appointment; and equity will not aid the attempted appointee unless he has a higher claim, because it is a maxim in equity that "when the equities are equal, the law will prevail." See *Tollett v. Tollett*, 1 Lead. Cas. Eq. 369; 1 Story Eq. Jur., § 177; Bisph. Eq., § 195; *Morriss v. Morriss*, 33 Grat. 51.

N. B. The equitable doctrine of *aider* of the defective execution of powers is confined to authorities conferred by the voluntary act of the donor in wills, deeds, and settlements; it does not extend to powers created and regulated by statute. The defective execution of *statutory* powers, in the failure to comply with the prescribed requisites, cannot be aided

Story Eq. Jur., § 173; 2 Pom. Eq., § 173; 2 Min. Ins. (4th ed.) 822; Hopkins, Real Prop. 318; *Bruce v. Bruce*, 11 L. R. Eq. 371. See 18 Am. & Eng. Ency. Law, 926, 982, 983.

As to the execution of a will in the exercise of a power, it is enacted by C. V., § 2515: "No appointment made by will in the exercise of any power shall be valid unless the same be so executed that it would be valid for the disposition of the property to which the power applies if it belonged to the testator; and every will so executed, except the will of a married woman, shall be a valid execution of a power of appointment by will, notwithstanding the instrument creating the power expressly require that a will made in execution of such power shall be executed with some additional or other form of execution or solemnity."

in equity. 2 Pom. Eq., §§ 590, 834. Thus, in *Williams v. Cudd*, 26 S. C. 213 (4 Am. St. Rep. 714), it is held that equity will not aid the defective execution of a statutory power given a married woman to relinquish her inheritance in lands. And the same has been held of the power of a tenant in tail to make leases under the statute of 32 Hen. VIII., ch. 28. 1 Story Eq., § 177; Wms. R. P. (56); Bisph. Eq., § 195.¹

II. *Estates in land with a power of disposition annexed.*

§ 241. **Power of Appointment Distinguished from an Interest in Land.**—A power of appointment is not *itself* an estate; but it is an authority given by the owner of property

¹ DEFECTIVE EXECUTION OF A POWER BY A MARRIED WOMAN.—In *Freeman v. Eacho*, 79 Va. 43, it is held that the defective exercise of a power conferred on a married woman by a deed of settlement will be aided in equity in the same manner, and upon the same conditions, as if she were *sui juris*. The court says: "It would seem strangely inconsistent to hold that, to the extent she is empowered to act, she is *sui juris*, and to deny to her acts within her competency [that is, the attempted, but defective exercise of a power] the effect of which, under like circumstances, would be given to those of a person not laboring under disability. The case is, therefore, unlike an application to reform a married woman's conveyance under a statute relating to alienations by married women. And the distinction is obvious. At common law a *feme covert* had no power to convey her land except by fine and recovery. This disability, however, is, to a certain extent, removed by statute in this, and doubtless in most, if not all, the States of the Union, whereby she is enabled, by uniting with her husband, and by privy examination, to make a conveyance of her property. But these statutes, being in derogation of the common law, are strictly construed, and must be closely followed to give validity to the conveyance. The courts, therefore, very properly refuse to reform such a conveyance against the wife; for to do so would be, in effect, to make a conveyance not authorized by statute. And the same rule applies to a defective acknowledgment by a married woman, which is an essential part of the execution of the deed." As to the privy examination of a married woman (no longer required), see now, in Virginia, C. V. § 2502, taking effect May 1, 1888; *infra*, § —.

to the donee of the power to designate what person or persons shall receive the property. The donee of the power may have a limited estate of his own in the property, as, *e. g.*, a life estate in land, with power to appoint the reversion in fee. But such power to appoint does not necessarily enlarge the estate on which it is engrafted; the power may be distinct and come in by way of addition, and require to be *exercised* in order to dispose of the inheritance. The rule is that when an estate is given expressly for life, though a general power of appointment is annexed, it does not convert the life estate into a fee, but the donee takes only a life estate, unless there is some manifest general intent to the contrary in the instrument. *Shermer v. Shermer*, 1 Wash. (Va.) 266 (1 Am. Dec. 460); *Burwell v. Anderson*, 3 Leigh (348); *May v. Joynes*, 20 Grat. 692; *Milhollen v. Rice*, 13 W. Va. 510, 524; 49 Am. Dec. 117. And when a testator gives a life estate with a general power of appointment of the inheritance, and in case of failure to appoint, gives the estate to certain persons, the latter take a *vested* remainder, subject to be defeated by the exercise of the power, and not an executory devise. *Fearne, Remainders* (227); 20 Am. & Eng. Ency. Law, 857; *Richardson v. Harrison*, 16 Q. B. Div. 85; *Rhett v. Mason*, 18 Grat. 541, 569. If the donee does not appoint, and there is no remainder over, the property reverts to the donor, or to his heirs or representatives. *Frazier v. Frazier*, 2 Leigh, 642; 2 Min. Ins. (4th ed.) 821. See *Johnson v. Cushing*, 15 N. H. 298 (41 Am. Dec. 694, and n. 704-'6.

§ 242. **Effect of a Power of Disposition Over Property on the Estate of the Devisee—Validity of Limitation Over.**—See for full discussion, *Rubey v. Barnett*, 12 Mo. 3; 49 Am. Dec. 112, and note; also 1 Va. Law Reg. 219, note by Judge Burks to *Farish v. Wayman*, 91 Va. 430. The cases are difficult to reconcile on any other principle than that of giving free play to the testator's intention; but the subject may be thus summarized.

§ 243. (1). When an Express Estate for Life is Given, and a Power of Disposition Over the Reversion is Annexed.—In this case the general rule is that the devisee for life will not take an estate in fee, notwithstanding the power to dispose of the inheritance. 20 Am. & Eng. Ency. Law, 955, and notes. The express estate for life negatives the intention to give the fee simple, and converts those words into words of *mere power*, which, standing alone, would have been construed to carry an *interest*. Thus in *Rubey v. Barnett*, *supra*, the testator said: "First my will is that my beloved wife, Polly Horn, shall have all my estate, both real and personal, so long as she may live; secondly, my will is that *my wife dispose of all said estate as she may think most advisable at her death.*" Held, that Polly took but a life estate with a distinct and naked gift of a power of disposition of the reversion; and that if she made no disposition, the reversion descended to the heirs of the testator. And see to the same effect, *Burleigh v. Clough*, 52 N. H. 267 (13 Am. Rep. 23); *Funk v. Eggleston*, 92 Ill. 515 (34 Am. Rep. 136). And again, it is often held that where a power of disposal accompanies a bequest or devise of a life estate the power is considered to be *over the life estate only*, and is limited to such disposition as a *life tenant* can make, unless there are other words clearly indicating that a *larger* power was intended. Thus in *Johns v. Johns*, 86 Va. 333, the testator gave all of his money (\$900) to his wife during her natural life for the benefit of herself and children, "*to be used as she may think proper.*" Held, that the use was of the *life interest* only, and the wife did not take the *absolute* property, as was contended on her behalf. And in *Brant v. Virginia Coal and Iron Co.*, 93 U. S. 326, the will read: "I give and bequeath to my beloved wife, Nancy Sinclair, all my estate, both real and personal, . . . to have and to hold during her life, *and to do with as she thinks proper before her death.*" Held, that the wife took a life estate in the property, with only such

power as a life tenant can have; and that her conveyance of the real estate passed no greater interest.

§ 244. (2). **When a Life Estate is Given Devisee, with Power of Disposition over the Reversion—Exception to General Rule.**—The devisee may be held to take a fee simple, *if otherwise the manifest intention of the will would be defeated*. This is by way of *exception* to the general rule laid down under (1) *supra*; and, resting on intention, must depend on the construction of the particular will. Thus, where the limitation is of a life estate, but there is given expressly or impliedly, full power of disposition over the fee, without limitation or restriction, the devisee is held to take, not the mere life estate, but the fee itself by implication; and a limitation over to another is void. This is known in Virginia as the doctrine of *May v. Joynes* (20 Grat. 692), where the testator said: "I give to my beloved and excellent wife, subject to the provisions hereafter declared, my whole estate, real and personal, and especially all real estate which I may hereafter acquire, *to her during her life, but with full power to make sale* of any part of the said estate, and to convey absolute titles to the purchasers; and use the purchase money for investment, or any purpose that she pleases; with only this restriction, that whatever remains at her death, shall, after paying any debts she may owe, or *any legacies that she may leave*, be divided as follows," viz.: among his children and grandchildren. *Held*, that the wife took a fee simple in the real estate, and an absolute property in the personal estate, and that the limitation over of *whatever remained at her death* was inconsistent with, and repugnant to, such fee simple and absolute property, and failed for uncertainty. See 1 Leading Cases R. P. 54, 65, 67; 2 Id. 478; 4 Id. 25, where *May v. Joynes* is said to be opposed to the weight of authority. But it has been followed in a number of cases in Virginia, and is supported by cases

elsewhere, and may be defended, perhaps, on the ground of manifest intent.¹

§ 245. Cases Following *May v. Joynes*.—These cases follow *May v. Joynes*:

(a). *Cole v. Cole*, 79 Va. 251: "I give to my wife, Martha A. E. Cole, all of my personal and real estate during her

¹ DOCTRINE OF *MAY V. JOYNES* INAPPLICABLE.—In *Cresap v. Cresap*, 34 W. Va. 310, the court says (p. 316): "In the will we are considering, the testator commences the disposition of his property in the following words: 'I give and bequeath to my beloved wife, Agnes C. Cresap, in trust, and for her support and maintenance during her life, all my estate, both real and personal, with full power and privilege to sell and convey any, all, or so much of my real estate, in such manner as she may see fit, in as full and complete manner as I myself can do; to sell and dispose of my personal estate, or so much as she may see fit, for her own support, according to her condition in life, and for the benefit of my estate so far as she may see proper.' Now, if the testator had omitted from this clause the words 'in trust and for her support and maintenance during her life,' and also the words 'to sell and dispose of my personal estate, or so much as she may see fit, for her support, according to her condition in life, and for the benefit of my estate, so far as she may see proper,' I would have no hesitation in saying that said testator intended by this portion of his will to give his wife a fee simple in the realty and absolute property in the personalty; but those limiting words are used by the testator immediately in connection with the language which confers the estate upon her. When we ask the question: How does he give it to his wife? the answer is prominent, and apparent on the face of the will, as plain as words can make it, 'in trust for her support and maintenance during life,' and this language applies both to real and personal estate." And on p. 323: "The case of *May v. Joynes*, 20 Grat. 692, is also cited to sustain the position that the wife took an absolute fee simple in said estate under this will; but by reference to the case it will be found very different from the one at bar; for in that case, although the property was given to her for life, she not only had full power to sell the same, convey absolute title to purchasers, and use the money for investment or any purpose that she pleased, with only this restriction, that whatsoever remains at her death shall, after paying any debts she may owe, or any

lifetime, and, at her death, half of the real estate and half of the personal property *that may be on hand*, to do with as she may see proper; and the other half of my real estate and personal property to go to the heirs of my brother, Sampson Cole." See also *Carr v. Effinger*, 78 Va. 197.

(b). *Hall v. Palmer*, 87 Va. 354: "I will and direct that the whole of Susan J. Hall's and Frances Maria Armes' interest in my estate shall be held by my executor, his executor, his heirs, etc., for the sole use and benefit of them during their natural life, and at their death, *the balance, if any*, to their children.

(c). *Bowen v. Bowen*, 87 Va. 438: "After the payment of all my just debts, I give, devise and bequeath to my wife, Adelaide Bowen, all my estate, real, personal, and mixed, *for and during her life*; and it is my wish and desire that my said wife may sell and convey my real estate, and receive the purchase money therefor; sell and use all of my personal

legacies that she may leave, be divided as follows, etc. This gave her the full power to dispose of the property as she pleased, by will or otherwise, and is not an analogous case."

In *Cresap v. Cresap*, there was a limitation over as follows: "At the death of my dear wife, Agnes C. Cresap, I desire the residue of my estate, both real and personal, to be distributed as follows," etc. The court sustained the limitation over, saying: "This will, and its provisions, can easily be relieved of any uncertainty as to quantity by ascertaining the amount the wife was entitled to, for support according to her condition in life, by referring the latter to a commissioner." And this passage from Schouler on Wills, § 592, is quoted with approval: "The gift of what remains undisposed of may, indeed, be often repugnant to the first gift, or too nearly so to vest a certain right; nevertheless, a gift is good of what shall remain at the decease of the first taker, if the latter has only a life estate given him, or if such gift is preceded by a power of disposition so restrained in its exercise that the gift of what is left refers evidently to what shall remain unappropriated and unappointed under the power." See 1 Jarm. Wills, 363-365. And the above extract from Schouler is also quoted in *Miller v. Potterfield*, 86 Va. 876, 881, a case strikingly like *Cresap v. Cresap*.

property, and buy and sell with the proceeds of such property for her own comfort and convenience as she may choose, without accountability to any person whatever. In fact, during the life of my said wife, I wish her to possess and enjoy the said property as if she enjoyed a fee simple and absolute estate therein. If, however, at the death of my said wife, *any of the said property shall remain*, I wish the same to be divided equally among all my nephews and nieces who may be living," etc.

May v. Joynes is also followed in *Farish v. Wayman*, 91 Va. 430 (criticized by Judge Burks, 1 Va. Law Reg. 220), and in *Robertson v. Hardy*, 23 S. E. Rep. 766, where the doctrine is thus laid down by Riely, J., speaking of a will by the first clause of which the testator had given personal property to his wife for her life: "‘All the personal property remaining at my wife’s death, of whatever kind or nature,’ says the testator in the second clause, ‘shall be sold and equally divided’ among certain of his children. The words ‘remaining at my wife’s death’ imply power in the wife to use, consume, and dispose of the personal property; and such power implies absolute dominion. Absolute dominion imports absolute ownership. When it is the intention of the testator that the first taker shall have an unlimited power of disposition over the property devised or bequeathed, whether such intention be expressed or necessarily implied, a limitation over to another is void, because it is inconsistent with, and repugnant to, the estate given to the first taker, although the will shows that it was the testator’s intention, in respect of the subject of the gift, that what may remain of it at the death of the first taker should go to another." See 2 Min. Ins. (4th ed.) 917, 1053, 1073; *Milhollen v. Rice*, 13 W. Va. 510; *Davis v. Heppert*, 96 Va. 775; *In re Burbank*, 69 Ia. 378; *Shaw v. Shaw*, (Ia.) 88 N. W. 327.

§ 246. Cases Distinguishing *May v. Joynes*.—The follow-

ing Virginia cases distinguish *May v. Joynes*, and sustain the limitation over:

(a). *Randolph v. Wright*, 81 Va. 608: The devise was in effect, "To my son, Edward and his heirs forever I give two-thirds of my real estate; . . . but if Edward die without a will or lawful issue, then to my son, Philip and his heirs." Testatrix died in 1849. See *Johnson v. Citizens' Bank*, 83 Va. 63.

(b). *Johns v. Johns*, 86 Va. 333. See § 243 (1).

(c). *Smythe v. Smythe*, 90 Va. 638: "I give and bequeath unto my two sisters, Kate A., and Mattie R. Smythe, all my estate of every kind, both real and personal, of which I may die seised, to be by them used and enjoyed *during their natural lives*. . . . The use and enjoyment of the said property shall be unrestricted by my said two sisters during their natural lives should they remain sole, carrying with such use and enjoyment the right to sell and convey said real estate should they find it desirable to do so; but I desire that they shall reinvest or loan the proceeds of such sale in some safe manner, and as far as possible avoid the consumption of the principal; and at the death of my two sisters, or the marriage of both, I desire *whatever of my estate may remain* shall vest in and become the property of the little boy, Claude Allison, whom I have adopted." Lewis, P., and Richardson, J., dissented.

§ 247. (3). **When an Estate is Given to a Person Generally, or Indefinitely (as, "to A"), with a Power of Disposition.**—Here the general rule is that the devisee takes the fee simple in land, or the absolute interest in personalty. Tiedeman R. P., p. 316, n. 2; § 564, n. 1. See *Roberts v. Lewis*, 163 U. S. 367 (s. c. 144 U. S. 653), overruling *Giles v. Little*, 104 U. S. 291. And in such a case, if there is a limitation over, it is void as a *remainder*, being after a fee simple, and void as an executory devise, because indefinite and uncertain, being in effect a limitation of so much only as the first taker may not happen to dispose of. *Wilmoth*

v. *Wilmoth*, 34 W. Va. 426. But even in this case, *if a life estate only is plainly intended* by the will, a fee simple in land, or an absolute interest in personal property, will not be construed to pass to the first taker, and a limitation over will be good. The great case establishing this exception is *Smith v. Bell*, 6 Peters 68, before the Supreme Court of the United States. In *Smith v. Bell*, the will read: "Also I give to my wife, Elizabeth Goodwin, all my personal estate, whatsoever and wheresoever, and of what nature, kind, and quality soever, after payment of my debts, legacies, and funeral expenses, which personal estate I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit and disposal absolutely, the *remainder* of the said estate, after her decease to be for the use of the said Jesse Goodwin [the testator's son]." It was held that the wife took only a life estate in the property (consisting mainly of slaves), and that the son, Jesse, had a vested remainder. The ground of the decision was the manifest purpose to provide for *both wife and son*, which could only be accomplished by such a construction. It was therefore held by Marshall, C. J., that the wife took a life estate only; that her power of disposition over the slaves was such (and no more) as a life tenant may make; and that "the strong words of bequest" employed by the testator probably referred to that part of the personal estate which was trifling and perishable, and would be consumed in the use, as to which the exercise of absolute ownership was necessary to a full enjoyment.

§ 248. **Status of the Doctrine of *Smith v. Bell*.**—*Smith v. Bell* is approved in *Miller v. Potterfield*, 86 Va. 876, where the will was as follows: "I give and bequeath to my beloved wife, Elizabeth Miller, all my property, both real and personal, to have and to hold the same for her own use and benefit, and also to make such disposition of the same that (*sic*) she, in her judgment, may deem best, should it become necessary that a part or all *should become necessary* (*sic*)

for the support of herself and William Garrett, who I desire should remain with her during her lifetime, and have such care and attention given him as he may need. After the death of the said Elizabeth Miller, I will and devise that any and all property *remaining unused* shall be given to the said William Garrett, to have and to use for his own benefit, or to make such disposition of as may be deemed best for his interest." *Held*, the wife took a life estate, with a conditional power of sale, and that the limitation over to William Garrett was good. The case was distinguished from *Cole v. Cole*, 79 Va. 251, on the ground that in that case the power of disposal given to the first taker was absolute, which necessarily rendered the limitation over repugnant, and void.¹ And in *Bowen v. Bowen*, 87 Va. 438, *supra*, it was said that the case at bar was distinguishable from *Johns v. Johns*, *supra*, and *Miller v. Potterfield*, by the fact that the power of disposal in the two latter cases was not for the sole benefit of the first taker, but in *Johns v. Johns* for the benefit of the widow and her children, and in *Miller v. Potterfield*, not only for the benefit of the widow, but of William Garrett. But in *Johns v. Johns*, it also appeared that the disposal conferred on the widow was *over the life estate only*, as has been stated above. See § 243 (1).

Smith v. Bell has been questioned, however (see 49 Am. Dec. 118), and is perhaps against the weight of authority; and it can only be upheld by *magnifying the intent*. But

¹ MILLER V. POTTERFIELD.—Of the language of the will in this case, the court says (quoting the part beginning with the words "and also to make such disposition," etc.): "This language restrains and qualifies that which precedes it, and confines, as it was obviously intended to confine, the power of disposal to the single case mentioned—that is to say, it was intended the widow should have the use of the property for life, but the power to dispose of it she was not to have unless a sale, in her judgment, should become necessary for the support of herself and Garrett. In that event, and in that event only, was she authorized to dispose of the corpus of the estate." And see *Cresap v. Cresap*, 34 W. Va. 310; *ante*, § 244, note.

it has never been overruled (or even doubted) by the Supreme Court of the United States, though in a number of cases it has been distinguished on the facts. See, especially, *Potter v. Couch*, 141 U. S. 296, 316; *Roberts v. Lewis*, 153 U. S. 367, 378. *May v. Joynes* in Virginia and *Smith v. Bell* in the Supreme Court of the United States, stand at the opposite extremes, and each is an exception to the general rule. The tendency now in the United States is to sustain the limitation over, if possible, in a case where property is given to the first taker with a power of disposal superadded.¹

¹ SMITH V. BELL EXPLAINED.—In *Potter v. Couch*, *supra*, 316, it is said by Gray, J.: "In *Smith v. Bell* the general doctrine was not denied; and the decision turned upon the construction of the words of a will by which a Virginia testator bequeathed all of his personal estate (consisting mostly of slaves) to his wife, to have for her own use and benefit absolutely; the remainder of the said estate, after her decease, to be for the use of his son. This was held to give the son a vested remainder, upon grounds summed up in two passages of the opinion by Chief Justice Marshall as follows: 'The limitation in remainder shows that in the opinion of the testator, the previous words had given only an estate for life. This was the sense in which he used them.' 6 Pet. 76. 'The limitation to the son on the death of the wife restrains and limits the preceding words so as to confine the power of absolute disposition, which they purport to confer, of the slaves, to such a disposition of them as may be made by a person having only a life estate in them.' 6 Pet. 84." And in *Roberts v. Lewis*, *supra*, it is said by the same judge, speaking of *Smith v. Bell*: "The wife had made no conveyance of the property; the words of the gift over were the technical ones, 'the remainder of my estate,' appropriately designating the whole estate after the wife's death; and the court distinctly intimates that if the will were construed as giving the wife the power 'to sell or consume the whole personal estate during her life,' a gift over of 'what remains at her death' would be 'totally incompatible' and 'void for uncertainty.' 6 Pet. 78."

CHAPTER XIII.

ESTATES ON CONDITION.

§ 249. **Nature and Classification of Conditions—Precedent and Subsequent.**—The words *precedent* and *subsequent*, as applied to conditions annexed to estates in land, have reference to the time when the estate vests. When the condition is precedent, the estate cannot vest until the condition is performed; when the condition is subsequent, the estate vests at once, but it is liable to be divested if the condition is not performed. In the one case the performance of the condition must precede the vesting of the estate, and the condition is therefore called precedent; in the other the non-performance of the condition follows the vesting of the estate, and the condition is therefore called subsequent.

It will be seen that a condition precedent is in its nature *creative*, since at the time of the grant no estate vests in the intended beneficiary. The conveyance is as yet inchoate, but on the happening of a certain event, or the performance of a certain act, the estate arises and takes effect in the grantee. On the other hand, the condition subsequent is in its nature *destructive*. Under such a condition, the estate is already vested in the grantee, but on the happening of a certain event (perhaps some default on his part) the estate may, at the will of the grantor, be divested and destroyed.¹

¹ **EXAMPLES OF CONDITIONS PRECEDENT.**—In 2 Bl. Com. (154), it is said of conditions: “Precedent are such as must happen or be performed before the estate can vest or be enlarged. . . . Thus, if an estate for life be limited to A upon his marriage with B, the marriage is a precedent condition; and till that happens, no estate is vested in A. Or if a man grants his lessee for years that upon the payment of a hundred marks within the

The distinction between conditions precedent and subsequent is thus stated by Magruder, C. J., in *Star Brewery Co. v. Primas*, 163 Ill. 652 (45 N. E. 145): "A precedent condition is one which must take place before the estate can vest or be enlarged; and if land is conveyed upon a precedent condition, the title will not pass until the condition is performed. A subsequent condition is one which operates upon an estate already created and vested, and renders it liable to be defeated. A deed upon condition subsequent conveys the fee when it is executed, but the fee passes subject to the contingency of being defeated as provided in the condition, the grantor having the power of reëntury upon condition broken; and if there is a breach of the condition, the estate continues in the grantee until defeated by actual entry. Whether a condition is precedent or subsequent depends on the intention of the parties." See 2 Tho. Coke, 1, n. A.; 2 Bl. Com. (154); 1 Shepp. Touchstone (117); 1 Prest. Estates (41);

term he shall have the fee, this also is a condition precedent, and the fee-simple passeth not until the hundred marks be paid."

In *Reuff v. Coleman*, 30 W. Va. 171 (3 S. E. 597), it was held that a legacy given as follows was contingent on two conditions precedent: "If the girl, Mary Cruver, remain with my family until she attain the age of 21 years, and continue to conduct herself as she has heretofore done, then my will is that my executor pay to her upon her so coming of age the sum of \$300.

In *Markham v. Hufford*, 123 Mich. 505 (81 Am. St. Rep. 22; 48 L. R. A. 580), the following bequest was held to be on a condition precedent: "To Almon L. Markham, the son of my daughter, Julia J. Markham, deceased, I give and bequeath the sum of \$500, to be paid to him at the expiration of two years from the date of my demise; provided that he shall be deemed a reformed man, in the judgment of the executors of this will." And see *Hawke v. Euyart*, 30 Neb. 149 (27 Am. St. Rep. 391).

For miscellaneous examples of conditions precedent, see *Ransdell v. Ransdell*, 172 Ill. 439 (43 L. R. A. 526); *Keffer v. Grayson*, 76 Va. 517; *Phillips v. Ferguson*, 85 Va. 509; *Vaughan v. Vaughan*, 97 Va. 322; *Jones v. Chesapeake, &c., R. Co.*, 14 W. Va. 514; and especially *Markham v. Hufford*, *supra*, where numerous cases are collected.

2 Tuck. Com. (88); 1 Lomax Dig. (262); 2 Min. Ins. (4th ed.), 265-6; 6 Am. & Eng. Ency. Law (2d ed.), 500; *Cross v. Carson* (Ind.) 44 Am. Dec. 742, and note; *Raley v. Umatilla County*, 15 Or. 172 (3 Am. St. Rep. 142); *Ecroyd v. Coggeshall* (R. I.), 79 Am. St. Rep. 741, and note; *Lewis v. Henry*, 28 Gratt. 192, 200.¹

§ 250. **Conditions Precedent and Subsequent; How Distinguished.**—In *Finlay v. King*, 3 Pet. 346, it is said by Marshall, C. J. (at p. 374): "It was admitted in argument, and is certainly well settled, that there are no technical and appropriate words which always determine whether a devise be on a condition precedent or subsequent. The same words have been determined differently; and the question is always a question of intention. If the language of the particular clause, or of the whole will, shows that the act on which the estate depends must be performed before the estate can vest, the condition is of course precedent; and unless it is performed, the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the

¹LEGACIES DEPENDENT ON A CONDITION PRECEDENT.—In deciding whether a legacy is vested or contingent, the rule is that when a legacy is given to a person to *be paid* at a future time, it vests immediately on the testator's death; but when it is *not given* until a future time, or when the time is annexed not to the payment only, but to *the gift itself*, the legacy does not vest until that time. Hence, "if the legacies are given *at 21*, or *if, when, in case*, or *provided* the legatee attains 21, or any other future definite period, these expressions annex the time to the substance of the legacy, and make the legatee's right to it depend on his being alive at the time fixed for payment. Consequently, if the legatee happens to die before that period arrives, his personal representative will not be entitled to the legacy." *Major v. Major*, 32 Gratt. 819, 823; *Sellers v. Reed*, 88 Va. 377; *Jones v. Habersham*, 107 U. S. 174; *Goebel v. Wolf*, 113 N. Y. 405 (10 Am. St. Rep. 404, and note); *Ducker v. Burnham*, 146 Ill. 9 (37 Am. St. Rep. 135, and note); *Patton v. Ludington*, 103 Wis. 629 (74 Am. St. Rep. 910); *Eldred v. Meek*, 183 Ill. 26 (75 Am. St. Rep. 86).

estate, but may accompany or follow it, if this may be collected from the whole will, the condition is subsequent."

The law as thus laid down has met with general approval, and is applicable to a deed as well as to a devise. *Nicoll v. New York, &c., R. Co.* 12 N. Y. 121; *Bell County v. Alexander*, 22 Texas 350 (73 Am. Dec. 268); *In re Stickney's Will*, 85 Md. 79 (60 Am. St. Rep. 308); *Markham v. Huford* (Mich.) 82 N. W. 222 (48 L. R. A. 580); *Alexander v. Alexander* (Mo.) 57 S. W. 110; *Lewis v. Henry*, 28 Gratt. 202; *Burdis v. Burdis*, 96 Va. 81 (70 Am. St. Rep. 824); *Jones v. Chesapeake, &c., R. Co.* 14 W. Va. 523; *Reuff v. Coleman*, 30 W. Va. 171.

Two examples will illustrate the reasoning by which a condition may be found subsequent in order to effectuate intent.

In *Nicoll v. New York, &c., R. Co.*, 12 N. Y. 121, it is said (after adopting the test in *Finlay v. King, supra*): "In this case it was evidently the design of the parties that the estate should vest at once, so that the grantee might proceed immediately with the construction of the road; otherwise a condition that it should be completed within a given time, or ever completed, would be impossible. From the character of the condition it could not be a condition precedent. Possession and control of the land must necessarily accompany the construction and precede the completion of the road. The grant is not made to take effect on the happening of a certain event, but *in presenti*, and liable to be divested by the grantee's failure to perform the condition."

In *Morse v. Hayden*, 82 Me. 227 (19 Atl. 442) it is said: "Conditions have no idiom. Whether precedent or subsequent is a question purely of intention to be gathered from the whole language adopted. Such conditions of support and maintenance in wills ["on condition that my wife (the devisee) shall provide and maintain our son until he shall attain his majority"], without any language charging the property with the performance of the conditions, or in deeds conveying farms, would seem to be conditions subsequent be-

cause of the implication that the devisees or grantees are to have possession and control of the premises for the purpose of fulfilling the conditions." And see *Lewis v. Lewis* (Conn.), 51 Atl. 854.

It may be added that a condition precedent enters into the very limitation of an estate, which it renders contingent, whereas, a condition subsequent is superimposed upon a previous limitation, which it renders defeasible. Thus whether a remainder is vested or contingent may depend on whether a condition is precedent or subsequent, and this will depend upon whether the condition is "incorporated into the gift to or description of the remainderman, or is added as a separate clause after words which have already given a vested interest." 20 Am. & Eng. Ency. Law 850; *Blanchard v. Blanchard*, 1 Allen (Mass.) 223; *Ducker v. Burnham*, 146 Ill. 9 (37 Am. St. Rep.) 135, 143. And see *New Orleans v. Texas, &c., R. Co.* 171 U. S. 312, 334, where it is said that the *suspensive* condition under the Louisiana Code is the equivalent of the condition precedent of common law.¹

¹REMAINDERS DEPENDENT ON CONDITION PRECEDENT OR SUBSEQUENT.—In deciding on the character of a remainder, it may be necessary to consider not only the time of its vesting, but also whether, though vesting at a certain time, it does so subject to be divested by a condition subsequent. Thus, in a devise "To my wife for life, and at her death, to my surviving children," it has been seen (§ 203, *supra*) that the word "surviving" refers to the death of the testator, unless the will manifests a contrary intent; and hence the children living at the death of the testator take vested estates. But, if there are words of contingency, such as, "if they shall be living at her death," or, "to such of them as shall be living at her death," these are conditions precedent, and limit the remainder to such of the children as shall survive their mother. *Blanchard v. Blanchard*, 1 Allen (Mass.) 223; *Cheatham v. Gower*, 94 Vs. 383; *Vashon v. Vashon*, 98 Va. 170.

As is said in *Ducker v. Burnham*, 146 Ill. 9 (37 Am. St. Rep. 135, 145): "When the devise is to the testator's wife for life, and at her death to such of his children as shall then be living, the benefit does not purport to be conferred on the children as children, or individuals named, but as survivors, which indicates that

§ 251. Condition Precedent or Subsequent; Which Favored in Law.—Here it is necessary to make a discrimination.

1. *In deciding whether the condition is precedent or subsequent.*

It is a maxim that the law favors the vesting of estates, in order that the land may not be “in a state of contingency.” Hence when the question is whether certain words in a grant or devise create a condition precedent or subsequent, the law leans to the latter construction; and the estate is deemed, if possible, to be vested in the grantee or devisee immediately, subject to be divested by the breach of the condition. A similar doctrine is applicable to remainders, and in doubtful cases they are construed as vested rather than contingent. And the law is the same as to legacies. See on the whole subject, *Pennington v. Pennington*, 70 Md. 418; *In re Stickley’s Will*, 85 Md. 79 (60 Am. St. Rep. 308); *Sellers v. Sellers*, 88 Va. 380; *Patton v. Ludington*, 103 Wis. 629 (74 Am. St. Rep. 910); *Blanchard v. Blanchard*, 1 Allen (Mass.) 223; *Chapman v. Chapman*, 90 Va. 409; *Crews v. Hatcher*, 91 Va. 378; *Vashon v. Vashon*, 98 Va. 170; *Major v. Major*, 32 Gratt. 823; *Jones v. Habersham*,

an immediate vesting is not intended.” See *Thomas v. Thomas*, 149 Mo. 426 (73 Am. St. Rep. 405, and note).

But, though “an immediate vesting” is intended, it may nevertheless be upon condition subsequent. Thus in *Ducker v. Burnham*, *ubi supra*, the court goes on to say: “But when the devise is to the wife for life, with remainder to certain named children, and with a subsequent provision that if any of such named children die before the wife, then the property is to be equally divided between the survivors, the devise of the remainder is to certain definitely specified and named individuals, who, as remaindermen already answer the description by which they are to take, and there is no obstacle to supposing an immediate vesting to have been intended.” And see p. 194, *supra*, note, for cases in which remainders have been held, not contingent upon a condition precedent, but vested estates upon condition subsequent, liable to be divested by the happening of the contingency. See also *Waring v. Waring*, 96 Va. 641.

107 U. S. 174; *Ducker v. Burnham*, 146 Ill. 9 (37 Am. St. Rep. 135); *Eldred v. Meek*, 183 Ill. 26 (75 Am. St. Rep. 86).¹

¹EXAMPLES OF CONDITIONS CONSTRUED AS SUBSEQUENT.—In 2 Bl. Com. (154) it is said: "But if a man grants an estate in fee-simple, reserving to himself and his heirs a certain rent, and that if such rent is not paid at the times limited, it shall be lawful for him and his heirs to reënter, and avoid the estate; in this case the grantee and his heirs have [rather the *grantee has*] an estate upon condition subsequent, which is defeasible if the condition be not strictly performed." For a modern instance of this kind of grant, see *Willis v. Com.*, 97 Va. 667. See also *Drummond v. Richards*, 2 Munf. (Va.) 337.

In *Finlay v. King*, 3 Peters 346, the words of the will were: "In case of having no children, I then leave and bequeath all my real estate at the death of my wife to William King, son of brother James King, on condition of his marrying a daughter of William Trigg and my niece, Rachel," etc. Marshall, C. J., applied the test laid down above in § 250, and held the condition to be subsequent. He said (p. 375):

"In the case under consideration, the testator does not in terms give his real estate to William King *on* his marrying the daughter of William and Rachel Tigg [as to this see § 250, note], but at the death of his, the testator's wife, on condition of his marrying a daughter of William and Rachel Trigg." And, after an elaborate argument based on the presumed intent of the testator, he adds (p. 376): "It is a general rule that a devise in words of the present time, as I give to A my lands in B, imports, if no contrary intent appears, an immediate interest which vests in the devisee on the death of the testator. It is also a general rule that if an estate be given on a condition, for the performance of which no time is limited, the devisee has his life for performance. The result of these two principles seems to be that a devise to A on condition that he shall marry B, if uncontrolled by other words, takes effect immediately; and the devisee performs the condition if he marry B at any time during his life. The condition is subsequent."

In *Burdís v. Burdis*, 96 Va. 81 (70 Am. St. Rep. 825), the words of the will were: "I leave and bequeath to my wife, Martha A. Burdis, the homestead and five acres around the house during her natural life, with the understanding that my son, Albert, will support and take care of her, and at her death said home-

2. *In dealing with the condition, after its character as precedent or subsequent has been ascertained.* In dealing with a condition *precedent*, when ascertained to exist, the law may be said to favor the condition, inasmuch as it must be punctually and precisely performed, or the contingent estate can never vest. And even if the condition be unlawful or impossible, yet, if precedent, the estate can never vest, as the contingency cannot arise, or the condition be lawfully performed. Nor will equity interpose, and grant relief for the non-performance of a condition precedent. *Davis v. Gray*, 16 Wall 203, 229; *Burdis v. Burdis*, 96 Va. 81 (70 Am. St. Rep. 825).

stead and land shall return to my son, Albert, as compensation therefor." The court (Riely, J., delivering the opinion) adopted the test laid down in *Finlay v. King* (see § 250, *supra*), and held the condition to be subsequent, and disposed of the case as follows:

"But if the language referred to be in legal effect a condition of the devise to the son, there is nothing in the will that makes the support and care of the wife of the testator by their son Albert necessarily precede the vesting in him of the estate in remainder, but much to indicate the contrary. The obligation relied on as a condition precedent was not a single act, to be done or omitted at once, but a continuing condition, which might run through a long series of years, and require the performance of many acts. . . . There is nothing in the will to indicate that the testator intended the devise of the son to remain in 'a state of contingency' during the many years that he might have the support and care of his mother, and it would be unreasonable to believe, without an express direction or plain implication in the will to that effect, that he so intended. . . . Taking the whole will together, as should be done, we are of the opinion that the condition upon which the testator's son, Albert, was to take the estate was a condition subsequent, and not a condition precedent; and its performance having been rendered impossible by the act of God, by the death of the wife in the lifetime of the testator, Albert holds the estate by an absolute title, as if the testator had attached no condition to the devise."

The court cited *Nunnery v. Carter*, 5 Jones, Eq. (S. C.), 370 (78 Am. Dec. 231). See in accord, *Parker v. Parker*, 123 Mass. 584; *Morse v. Hayden*, 82 Me. 227 (19 Atl. 443).

But when the condition is found to be *subsequent*, the law then declares that the estate, already vested, shall, if possible, remain vested, *i. e.*, shall not be forfeited; and hence the doctrine that conditions subsequent, "as they go in destruction and defeasance of estates are odious in law, and shall be taken strictly." That is to say, the terms of a condition subsequent shall be construed strictly, against the grantor or depositor imposing it, in deciding what is required to be done or forborne by the grantee or devisee; and as to what is required, a *substantial* performance will suffice to save the estate, and only a substantial failure to perform will work a forfeiture. *Maddox v. Adair* (Texas), 66 S. W. 811. And the disfavor in which conditions subsequent (as destroyers of estates) are held may be seen in the doctrine as to the persons to whom they may be reserved, and by whom they may be enforced; in the doctrine of equitable relief against forfeiture when compensation may be made; and in the fact that an impossible or illegal condition is void, and the grantee or devisee takes the estate free from the condition, the estate thus becoming absolute and indefeasible. *Jackson v. Schutz*, 18 Johns. 174 (9 Am. Dec. 195, and note at p. 202); *Coppage v. Alexander*, 2 B. Monroe, 313 (38 Am. Dec. 153, and note at p. 160); *Cross v. Carson*, 8 Black. (Ind.) 138 (44 Am. Dec. 742, and note at p. 744); *Taylor v. Sutton*, 15 Ga. 103 (60 Am. Dec. 682); *Thompson v. Thompson*, 9 Ind. 323 (68 Am. Dec. 638, 645); *Emerson v. Simpson*, 43 N. H. 475 (80 Am. Dec. 184, s. c. 82 Am. Dec. 168); *Rawson v. School District*, 7 Allen (Mass.) 125 (83 Am. Dec. 670); *Kilpatrick v. Mayor of Baltimore*, 81 Md. 179 (48 Am. St. Rep. 509); *Faith v. Bowles*, 86 Md. 13 (63 Am. St. Rep. 489); *Lewis v. Henry*, 28 Gratt. 192, 203; *Burdis v. Burdis*, 96 Va. 81 (70 Am. St. Rep. 825, and note).

§ 252. **Words Proper for a Condition Subsequent.**—We have seen that there are no technical words to distinguish between conditions precedent and conditions subsequent; and that the same words may indifferently make either, according

to the intent of the person who creates the condition. But though words of contingency do not create a condition precedent, it does not follow that they create a condition subsequent. As is said by Morton, J., in *Clapp v. Wilder*, 176 Mass. 342: "In numerous cases, for one reason or another, words apt to create a condition at common law in a deed have been interpreted as meaning something else—limitations, covenants, restrictions, easements, servitudes, trusts—because it was thought that such a construction would best conform to and carry out the intention of the parties."

While this is the case, and manifest intention may negative condition altogether, it is important to inquire what words are "apt to create a condition at common law," and have *prima facie*, at least that effect. It is to be noticed that in the discussion of these words the books invariably contemplate conditions subsequent, though the same words might in a proper case create a condition precedent.

It is laid down by Littleton (2 Tho. Co. 4, 5) that the following words, "by virtue of themselves, without any more saying," make an estate upon condition [*i. e.*, upon condition subsequent], viz., "on condition" (*sub conditione*), "provided" (*proviso*), and "so that" (*ita quod*). But Littleton points out a diversity between the words aforesaid and other words of condition, such as "if it happen," etc. (*si contingat*, etc.): "For these words, *si contingat*, etc., are nought worth to such a condition unless it [*sic*] hath these words following, 'That it shall be lawful for the feoffor and his heirs to enter,' etc. But in the cases aforesaid it is not necessary by the law to put such clause, viz., that the feoffor and his heirs may enter, etc., because they may do this by force of the words aforesaid, for that they contain in themselves a condition, viz., that the feoffor and his heirs may enter, etc."¹

¹ WORDS HELD SUFFICIENT TO CREATE A CONDITION SUBSEQUENT.—The following words have been held sufficient to create a technical common law condition subsequent, rendering the estate liable to be divested for its breach: "Provided, however, that

The same doctrine is laid down in *Sheppard's Touchstone* (p. 121) as follows: "Know, therefore, that for the most part conditions have conditional words in their frontispiece, and do begin therewith; and that amongst these words there are three words that are most proper, which in and of their own nature and efficacy, without any addition of other words of reëntry in the conclusion of the condition, do make the estate

this conveyance is on the condition," etc. (*Gray v. Blanchard*, 8 Pick. (Mass.) 283); "And this conveyance is upon the express condition," etc. (*Clapp v. Wilder*, 176 Mass. 332); "The said land being conveyed on the express understanding and condition," etc. (*Mead v. Ballard*, 7 Wall. 290. And see *Hale v. Finch*, 104 U. S. 261); "And if said second party shall fail to build said railroad, etc., then the property hereby sold as aforesaid is to revert to the said first party, and reinvest in them the same as they now hold the same." (*Schlesinger v. Kansas City, &c., R. Co.*, 152 U. S. 444. And see *Preston v. Bosworth*, 158 Ind. 458; 74 Am. St. Rep. 313. *Shun v. Claghorn*, 69 Vt. 45; 37 Atl. 236. *Houston, &c., R. Co. v. Compress Co.* (Texas), 56 S. W. 367); "In case such pass [an annual pass over the company's railway during the grantor's life] is not given, or if it shall be revoked, then said deed to be void" (*Ruddick v. St. Louis, &c. R. Co.*, 116 Mo. 25; 38 Am. St. Rep. 570); "In case of breach of this covenant [not to erect buildings which would obstruct the grantor's view] the said premises to be forfeited" (*Gibert v. Peteler*, 38 N. Y. 165; 97 Am. Dec. 185); "If the company shall refuse and neglect [to erect certain buildings, etc.] it shall be lawful for the parties of the first part, their heirs, executors, administrators, or assigns to reënter, repossess, and enjoy the said lands and premises as in their former estate" (*Bouvier v. Baltimore, &c., R. Co.* (N. J.), 47 Atl. 772).

The above examples show that it is sufficient in order to create a condition (1) to use the technical words "on condition," "provided," "so that," which of themselves, in the absence of a contrary intent, confer, on breach, the right of reëntry and enforcement of forfeiture; or (2) to use words indicative of the *consequences* which flow from a breach of condition, from which the intent to create a condition is implied, such as that, on the default of the grantee, the estate granted shall be void, or shall be forfeited, or shall revert to the grantor, or that the grantor may reënter, etc.

conditional, as *proviso, ita quod, and sub conditione*. . . . But there are other words, as *Si, si contingat*, and the like, that will make an estate conditional also; but then they must have other words joined with them, and added to them in the close of the condition; as that then the grantor shall reënter, or that then the estate shall be void, or the like.”

In accord with the law as thus laid down by Littleton and in the *Touchstone*, see 2 Min. Ins. (4th ed.) 492; 6 Am. & Eng. Ency. Law (2d ed.) 501, note; *Rawson v. School District*, 7 Allen (Mass.) 125 (83 Am. Dec. 670); *Brown v. Caldwell*, 23 W. Va. 187; *Raley v. Umatilla County*, 15 Or. 142 (3 Am. St. Rep. 142); *Clapp v. Wilder*, 176 Mass. 332; *Papst v. Hamilton* (Cal.) 66 Pac. 10.

§ 253. **Condition Subsequent Distinguished from a Limitation.**—A condition subsequent must be distinguished from a limitation, which is not a condition at all, although it is called by Littleton a “condition in law.” 2 Tho. Co. (120). The only resemblance between a condition subsequent and a limitation is that each may so operate as to put an end to an estate; but the mode of operation is entirely different. “A limitation will necessarily determine the estate; a condition may defeat an estate.” 1 Shepp. Touch. (117) by Preston. As this subject has been rendered obscure by Littleton’s unfortunate nomenclature, it may be well to go into it at some length.¹

¹ LIMITATION OR CONDITION SUBSEQUENT.—The words proper for a limitation are stated by Coke to be *Dum, donec, durante, tamdiu, etc.*, signifying “until,” “during,” “whilst,” “so long as,” etc. 2 Tho. Co. (121). Blackstone’s illustrations are: “As when land is granted to a man *so long as* he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he shall have made £500, and the like.” 2 Bl. Com. (155).

In *Atlanta, &c., R. Co. v. Jackson*, 108 Ga. 634 (34 S. E. 184), the court approves this language taken from 2 Washburn on Real Property (5th ed.), p. 27: “The only general rule, perhaps, in determining whether words are words of condition or limitation is that where they circumscribe the continuance of the estate, and mark the period which is to determine it, they are words of

Upon every grant of an estate there is a limitation, express or implied, in order to mark out and define the measure of the estate, *i. e.*, the length of time it is to continue. Accordingly, certain words used for this purpose are called *words of limitation*, *e. g.*, "heirs," "heirs of the body," etc. (See §§ 35, 192, *supra*.) Now if an estate is granted to A for 21 years, or to A for life, or to A and the heirs of his body, and nothing more is said, it is clear that there is a limitation, and a limitation only; and it could hardly be imagined that the fact that the estate is to end when the years elapse, or the grantee dies, or dies without issue, constitutes these events conditions, as if the grantor should say, "I give you the land for life, on condition you do not die!" There is no condition.

limitation; when they render the estate liable to be defeated, in case the event expressed should arise before the determination of the estate, they are words of condition. . . . The distinction between condition and limitation is that the latter determines the estate of itself; the former to have that effect requires some act of election on the part of him or his heirs in whose favor the condition is created."

In *Smith v. Smith*, 23 Wis. 176 (99 Am. Dec. 153), the following extract is made from the editor's note to Greenleaf's edition of Cruise's Digest on Real Property: "A condition is something inserted for the benefit of the grantor, giving him the power, on default of performance, to destroy the estate if he will, and revest the estate in himself or his heirs. As the law does not presume forfeiture, it requires some express act of the grantor as evidence of his intention to reclaim the estate, *viz.*, an entry.

"A limitation is conclusive of the time of continuance, and of the extent of the estate granted, and beyond which it is declared at its creation not to be intended to continue. Conditions render the estate voidable by entry; limitations render it void without entry. . . . A limitation is imperative, and is determined by rules of law. A condition not only depends on the option of the grantor, but is also controlled by equity if the grantor attempts to make an inequitable use of it. The performance of a condition [subsequent] is excused by the act of God, or of the law, or of the party for whose benefit it was made; a limitation determines the estate absolutely whatever be its nature."

The estate for life is given *until the grantee's death*; and when that event happens, it *expires by limitation*.

To constitute a condition subsequent, there must be something added to the limitation, "a distinct clause," whose office is "to defeat the estate [already limited] on some event which may happen, or on some act to be done, before the estate has filled the utmost measure or time appointed for its continuance." 1 Shepp. Touch. (117). Here the estate granted has not filled out the measure of its *limitation* when the *condition* is broken; and for such breach the grantor may enter and divest the estate, which does not end by limitation, but is destroyed by the enforcement of a forfeiture. The grantor may waive the forfeiture, and then the estate will continue as limited. But when the period of *limitation* has passed, the estate ends of itself and without entry. Indeed, it *cannot* continue longer, even if the grantor wishes it, for there is nothing to continue. 1 Preston, Estates (45); 2 Tho Co. (87) n. (L. 2); 2 Bl. Com. (155); *Millan v. Kephart*, 18 Gratt. 1, 7; *Smith v. Smith*, 23 Wisc. 176 (99 Am. Dec. 153) *Atlanta, &c., R. Co. v. Jackson*, 108 Ga. 634 (34 S. E. 184).

§ 254. Marriage as a Limitation or Condition Subsequent.

—It will conduce to clearness to illustrate the difference between a limitation and a condition by the not uncommon case of a gift to a widow dependent on her not marrying again. Let us suppose first that land is given a widow while she remains unmarried (*durante viduitate*): is this a limitation or a condition? And if she marries, does she forfeit the estate, or does it expire by limitation? It is not difficult to see that it is a limitation merely, without the semblance of a condition. How long is the land given the widow? While she remains unmarried, or what is the same thing, until she marries. Nothing is said about her life; it is not limited until her death, but until her marriage. When, therefore, she marries, she has enjoyed all the estate that was given her, and cannot complain that she has lost anything by

forfeiture; the land was given her until her marriage, and on that event, the estate ends by limitation. And while the estate might have continued until the widow's death, if she had remained unmarried, yet it is not true that on her marriage a larger estate limited is thereby cut short and defeated. The estate is until her marriage, and when that takes place, whether sooner or later, the entire estate given has been enjoyed, and is at an end without entry by the grantor.

But suppose land is given to a widow for life, with a condition superadded that she shall not marry; and with a proviso that if she does marry, the grantor may enter upon the land immediately, and resume possession. Here the limitation is for life, which is equal to until death. But this is not all. There is superadded or imposed on the limitation a condition, viz., that the widow shall not marry. Suppose, however, she does marry, what is the result? Will her estate, in case the grantor enforces the condition and takes the land from her, end by limitation? Clearly not, for the estate limited was for her life, and would not end by limitation until her death; whereas her estate is divested and ends on her marriage—perhaps many years before her death. Hence the estate has died a violent death; the estate limited to the widow was larger than that which she has enjoyed; the entry of the grantor cuts it short before the time limited. The widow forfeits for breach of condition.

It may be objected that in the two cases just put the practical effect is the same, whether we regard the language as importing a limitation or a condition; that in either case, if the widow does not marry, her estate continues until her death; while if she does marry, her estate is at an end. But there is an important difference. If the land is given to the widow until she marries, the effect of her marriage is to terminate her estate *ipso facto*, and immediately. No entry by the grantor is required in order to terminate her estate. If the widow remains in possession, it is as tenant by sufferance, or by virtue of some new estate given her by the grantor.

When, however, the land is given to the widow for life on condition that she does not marry, the effect of her marriage is not to end her estate *ipso facto*; for a life estate was given her, and that does not expire by limitation on marriage. The grantor must reënter and take the land, or the widow will remain in possession by virtue of her old estate. In other words, she is liable to forfeit the life estate on her marriage, but if the grantor waives the forfeiture (as he may) the life estate continues to its natural termination. *Coppage v. Alexander*, 2 B. Monroe, 313 (38 Am. Dec. 153); *Little v. Birdwell*, 21 Tex. 597 (73 Am. Dec. 242); *Bostick v. Blades*, 59 Md. 231 (43 Am. Rep. 548); *Mann v. Jackson*, 84 Me. 400 (24 Atl. 886); *Gillespie v. Allison*, 117 N. C. 512 (20 S. E. 627); *Dubois v. Van Valen* (N. J.) 48 Atl. 241; *Shaw v. Shaw*, (Ia.) 68 N. W. 327; *Chenault v. Scott* (Ky.) 66 S. W. 759.

§ 255. **Collateral Limitation.**—We have seen the nature of a simple limitation, and how it differs from a limitation with a condition subsequent imposed on it. Let us now consider a *collateral* limitation. In 1 Preston on Estates (42) it is said:

“A direct limitation marks the duration of an estate by the life of a person, or by the continuance of heirs, or by a space of precise and measured time; making the death, of the person in the first example, the continuance of heirs in the second example, and the length of the given space in the third example, the boundary of the estate or the period of duration. A collateral limitation, at the same time that it gives an interest which may have continuance for one of the times in a direct limitation, may on some event which it describes put an end to the right of enjoyment during the continuance of that time.”

In *Millan v. Kephart*, 18 Gratt. 1, it is said by Joynes, J.: “A collateral limitation marks an event which may happen within the time described in the direct limitation; and on the happening of that event puts an end to the estate. Thus

a lease 'To A for 20 years or until B shall return from Rome' may cease and determine either by the expiration of twenty years, the time marked for its duration by the direct limitation, or by the happening within that time of the event described in the collateral limitation, to-wit, the return from Rome. In either case the estate of the tenant will have reached the utmost bounds marked for its continuance by the limitation by which its duration is governed; and so, in either case, the right of the tenant will be absolutely at an end without entry or other act on the part of the landlord."¹

¹ REMAINDER AFTER A COLLATERAL LIMITATION DISTINGUISHED FROM A CONDITIONAL LIMITATION.—For the definition and explanation of a conditional limitation, see *supra*, § 212. It is there stated that a limitation over after a particular estate defeasible by condition subsequent cannot be a remainder, and is void at common law. *Outland v. Bowen*, 115 Ind. 150 (7 Am. St. Rep. 420); *Carney v. Kain*, 40 W. Va. 758 (23 S. E. 650, 659); *Lockridge v. McCommon*, 90 Tex. 234 (38 S. W. 33). But, of course, a remainder can follow a particular estate to end by limitation, and this whether the limitation of the particular estate be single or double, direct or collateral.

Thus a devise to A during her widowhood, with remainder to B and his heirs, gives B a vested remainder. In construction of law, A has an estate of freehold, because it is of uncertain duration and may by possibility last for her life. See § 9, *supra*; 1 Preston, Estates (127). A's estate will end by limitation either on her marriage or death; but in either case, B, a certain person, is ready to take. Hence the remainder is vested. *Little v. Birdwell*, 21 Texas, 597 (73 Am. Dec. 242); *Gillespie v. Allison*, 117 N. C. 512 (20 S. E. 627); *Dubois v. Van Valen* (N. J.), 48 Atl. 241.

And it is even held that a devise to the testator's wife, "so long as she should remain his widow, and on her second marriage to B and his heirs," gives B a vested remainder, the construction being that B is to take in whichever way the widow's estate ends, whether by her death or by her marriage. *Fearne on Rem.* (5), note (d); *Underhill v. Rodes*, 2 Ch. D. 494 (17 Moak, 589); 20 Am. and Eng. Ency. Law (1st ed.), 864 and note.

In the above examples, the *express* limitation was single or direct; but as the estate is determinable on more than one event, the limitation is considered collateral, by intendment of law.

Again, suppose land is granted to a widow "until her death or marriage." Here the grantor has chosen two events as alternative limitations, on the happening of either of which the estate given immediately determines. The limitation *until death* is the longer or direct limitation; that *until marriage* is the shorter or collateral limitation, since by it the widow's estate may end during her life. But her marriage cannot be regarded as a cause of forfeiture. That event is embodied in the limitation itself, as part of it, and does not follow the limitation for life "as a distinct clause," to defeat the larger estate granted. Hence it results that no more on the marriage than the death of the widow is entry by the grantor necessary to terminate her estate; for on either event it ends of itself, by limitation.

Thus in *Coppage v. Alexander*, 2 B. Mon. (Ky.) 313 (38 Am. Dec. 153), the devise was: "I give unto my beloved wife,

An express collateral limitation would be, as we have seen above, "To A *for life, or until her marriage.*" Sometimes the express and implied collateral limitations are treated without discrimination, and as if all were express. See 1 Preston on Estates (42), where these examples are given of collateral limitations: "To a man and his heirs, tenants of the manor of Dale; or to a woman during widowhood; or to C until the return of himself or B from Rome; or to D for 21 years if A should so long live."

Returning to limitations over after determinable particular estates, a remainder, even at common law, may be limited to commence on the event which is to determine the particular estate, as when a grant is made, "To A until his return from Rome; and from and after A's return, remainder to B and his heirs (see § 178, *supra*). For, in the language of Preston (Estates (54), "the event is part of the measure of the estate [of A] or [its] duration of ownership, and not a condition. The event is to determine the estate by limitation, and not to defeat it by conditions. The particular estate must have filled the measure of [its] duration before the remainder can confer a right to the possession." And see for fuller explanation Fearn (10), Butler's note. And the same explanation is applicable to a remainder after an estate "to A for 99 years, if he shall so long live." The contingent clause is not a condition subsequent, but a part of the original limitation of A's estate. See § 179, *supra*.

Mary Alexander, the half of my land I now own during her widowhood or life;" and it was held that this should be construed "as a limitation expressive of the duration of the estate, and not as a condition subsequent." The court said: "The happening of either event was intended to terminate the estate. It was intended as a benefit *durante viduitate* and no longer. The estate was not vested for life, to be forfeited if she married; but is vested during her widowhood only, in the event of her marriage, and must cease with the termination of her widowhood, as one of the periods to which it was limited, and upon the accrual of which it was made to expire." And see *Pearse v. Owens*, 3 N. C. 415 (2 Hayw. 234).

§ 256. **Collateral Limitation by Way of a Base Fee.**—For an explanation of a base or determinable fee, see § 37, *supra*. In 2 Bl. Com. (154), base fees are classed with estates on condition subsequent, but this a mistake. A base fee is a fee determinable on a contingent event. The estate is limited in fee or *until the event*; and on the happening of the event it ends *instantly*, and no entry of the grantor is necessary in order to terminate it. The event is therefore in the nature of a *limitation* of the estate, and not a condition subsequent. See 1 Prest. Est. (126), (442); *Union Canal Co. v. Young*, 1 Whart. (Pa.) 410 (30 Am. Dec. 212); *Léonard v. Burr*, 18 N. Y. 96; *Smith v. Smith*, 23 Wisc. 176 (99 Am. Dec. 153); *Henderson v. Hunter*, 59 Pa. St. 335; *United States Pipe Line Co. v. Delaware, &c., R. Co.*, 62 N. J. Law, 254 (41 Atl. 759; 42 L. R. A., 572); *Atlanta, &c., R. Co. v. Jackson*, 108 Ga. 634 (34 S. E. 184). And see *Bolling v. Petersburg*, 8 Leigh (Va.) 224, 234.

The grantor of a base fee while the event remains contingent has no reversion in the land granted, but only a *possibility of reverter*, i. e., a chance to get back the estate if the event does happen at any future time. And in Gray's *Rule against Perpetuities*, §§ 31–42, it is contended that since the statute of *Quia Emptores*, abolishing tenure between

feoffor and feoffee on a grant of the fee-simple (see § 54, *supra*), possibilities of reverter are not valid interests in land, and that by virtue of that statute base fees have ceased to exist. But in the United States base fees are not considered as dependent on the existence of tenure, and are still recognized as valid estates, as Prof. Gray concedes and laments.

In *First Universalist Society v. Boland*, 155 Mass. 171, it is said: "A question or doubt, however, has arisen, though not urged by counsel in this case, whether after all there is now any such estate as a qualified or determinable fee, or whether this form of estate was done away with by the statute of *Quia Emptores*. See Gray, *Rule against Perpetuities*, §§ 31-40, where the question is discussed and authorities are cited. We have considered this question; and whatever may be the true solution of it in England, where the doctrine of tenure still has some significance, we think the existence of such an estate as a qualified or determinable fee must be recognized in this country, and such is the general consensus of opinion of courts and text-writers." Many authorities are cited by the court (p. 175).

Prof Gray also argues (*Rule against Perpetuities*, § 312) that such possibilities of reverter, if allowed, would violate the rule against perpetuities, as the reverter might not take place within lives in being and 21 years thereafter. But this objection has not been allowed in the United States. See *First Universalist Society v. Boland*, *supra*, where it is said (at p. 175): "Clark's possibility of reverter [after a base fee] is not invalid for remoteness. It has been expressly held by this court that such possibility of reverter upon a breach of a condition subsequent is not within the rule against perpetuities. *Tobey v. Moore*, 130 Mass. 448; *French v. Old South Society*, 106 Mass. 479. If there is any distinction in this respect between such possibility of reverter and that which arises on the determination of a qualified fee, it would seem to be in favor of the latter. But they should be governed by the same rule. If one is held void for remote-

ness the other should be. The very many cases cited in Gray, *Rule against Perpetuities*, §§ 305-312, show conclusively that the general understanding of courts and the profession in America has been that the rule as to remoteness does not apply; though the learned author thinks this view erroneous on principle." See note to *Barnum v. Barnum* (Md.) 90 Am. Dec. 103-4.

For a recent case in which an estate was held to be a base fee, see *Pettitt v. Stuttgart, &c., Institute* (Ark.) 55 S. W. 485. For other cases in which reference is made to base fees, see *Stuart v. Easton*, 170 U. S. 394; *Noyes v. St. Louis, &c., R. Co.* (Ill.) 21 N. E. 487; *Hunter v. Murfee* (Ala.) 28 So. 9.

§ 257. **Condition Subsequent Distinguished from a Covenant; Covenant Favored.**—In many cases words relied upon as creating a condition subsequent, and technically sufficient for that purpose, have, upon their true construction, been held to be contractual in their nature, imposing the obligation of a covenant, and not conditional, with liability to forfeiture. "A condition differs from a covenant. The legal responsibility of non-fulfilment of a covenant is that the party violating it must respond in damages. The consequence of the non-fulfilment of a condition is forfeiture of the estate. The grantor may reënter and possess himself of his former estate. This court [of equity], in a proper case, can enforce the specific performance of a covenant; but it cannot enforce the specific performance of that in a deed, the non-performance of which works a forfeiture of the estate." *Woodruff v. Woodruff*, 44 N. J. Eq. 349 (1 L. R. A. 380, and note). See also *Post v. Weil*, 115 N. Y. 361 (12 Am. St. Rep. 809, 818); *Chicago, &c., R. Co. v. Titterington*, 84 Texas, 218 (31 Am. St. Rep. 39, 42); *Brown v. Chicago, &c., R. Co.* (Iowa), 82 N. W. 1003.

It is well settled that no particular words are necessary to create a covenant. In Sheppard's *Touchstone* (162) it is said: "And there needs not, in this case, formal and orderly

words, as covenant, promise, and the like, to make a covenant on which to ground an action of covenant; for covenant may be had by any other words; and upon any part of an agreement in writing [under seal], in what words soever it be set down for anything to be or not to be done, the party to or with whom the promise or agreement is made, may have this action [of covenant] upon the breach of the agreement." See *Hale v. Finch*, 104 U. S. 261, where this language is quoted with approval; *Graves v. Deterling*, 120 N. Y. 448, 457.¹

¹ COVENANT OR CONDITION SUBSEQUENT.—In *Post v. Weil*, 115 N. Y. 361 (12 Am. St. Rep. 809) the deed contained these words: "Provided always, and these presents are upon this express condition, that the aforesaid premises shall not, nor shall any part thereof, or any building or buildings thereon erected, be at any time hereafter used or occupied as a tavern or public house of any kind." Held, that these words were intended as a restriction, created for the benefit of the adjoining property, expressed in the strongest terms, and which was enforceable as a covenant running with the land, and was not a condition subsequent, imposed for the personal benefit of the grantors and their heirs. And see *Clark v. Martin*, 49 Pa. St. 289; *Watrous v. Allen*, 57 Mich. 362 (24 N. W. 104).

On the other hand, in *Clapp v. Wilder*, 176 Mass. 333, these words: "And this conveyance is made upon the express condition that said Wilder and Hills, their heirs and assigns, shall never erect any building nearer the street line of the said land than the store building now thereon," created a technical, common law condition, the only remedy for which was the enforcement of a forfeiture. The court said:

"No doubt there is a disposition among courts to look for something in the deed which shall modify the severity of the language [*i. e.*, as creating a condition]; and sometimes considerable astuteness has been exercised in this direction (*Post v. Weil*, 115 N. Y. 361); and no doubt the language [of condition] is sometimes used when from the whole deed it sufficiently appears that it could not have been intended in its full technical sense, and in such cases a restriction and not a technical condition is the result." Morton, J., wrote a strong dissenting opinion, approving *Post v. Weil*, in which Knowlton and Lathrop, JJ., concurred.

For other cases of words construed as covenants, see *Super-*

It is also well settled that as conditions subsequent tend to destroy estates, they are not favored in law. *Peden v. Chicago, &c., R. Co.* 73 Iowa 378 (5 Am. St. Rep. 680); *Kilpatrick v. Mayor of Baltimore*, 81 Md. 179 (48 Am. St. Rep. 509). In *Scovill v. McMahon*, 62 Conn. 378 (36 Am. St. Rep. 350), it is said: "The law is well established that such conditions are not favored, and are created only by express terms or clear implication; that courts will always construe clauses in deeds as covenants rather than conditions, if they can reasonably do so; that if it is doubtful whether a clause in a deed imports a condition or a covenant, the latter construction will be adopted; and that though apt words for the creation of a condition are employed, yet, in the absence of an express provision for reëntry or forfeiture, the court, from the nature of the acts to be performed or prohibited by the language of the deed, from the relation and situation of the parties, and from the entire instrument, will determine the real intention of the parties." See in accord *Curtis v. Board of Education*, 43 Kansas, 138 (23 Pac. 98); *Greene v. O'Connor*, 18 R. I. 56 (19 L. R. A. 262, and note); *Elyton Land Co. v. South &c., R. Co.* 100 Ala. 396 (14 So. 207); *Faith v. Bowles*, 86 Md. 13 (63 Am. St. Rep. 489); *King v. Norfolk, &c., R. Co.*, 99 Va. 625; *Lowman v. Crawford*, 99 Va. 689.

But although no technical words are required to create a covenant, and although even technical words of condition may be construed as a covenant, if such be the intention, yet as is said in *Palmer v. Plankroad Co.* 11 N. Y. 376, 389: "It is clear from the authorities that there may be a condition without a covenant; and that where the language imports

visors v. Bedford High School, 92 Va. 292; *Thornton v. Trammell*, 39 Ga. 202; *Hartung v. Witte*, 59 Wisc. 285 (18 N. W. 175); *Curtis v. Board of Education*, 43 Kansas, 138 (23 Pac. 98); *Star Brewery v. Primas*, 163 Ill. 652 (45 N. E. 145); *Carroll County Academy v. Trustees, &c.* (Ky.) 47 S. W. 617. And see *Stuart v. Easton*, 170 U. S. 383.

a condition merely, and there are no words importing an agreement, it cannot be enforced as a covenant, but the only remedy is through a forfeiture of the estate. . . . It by no means follows that because a grantor consents to take an estate subject to a certain condition that he also consents to obligate himself personally for the performance of the condition. Many cases might be imagined where one would be willing to risk the forfeiture of the estate, while he would be altogether unwilling to incur the hazard of a personal responsibility." See *Hale v. Finch*, 104 U. S. 261, 269; *Blanchard v. Detroit, &c., R. Co.*, 31 Mich. 43, 52; *Close v. Burlington, &c., R. Co.*, 64 Ia. 150 (19 N. W. 186). And see *Brown v. Chicago, &c., R. Co.* 82 N. W. 1003, where it is said: "Surely unless the terms of the deed were such that its acceptance imposed some obligation on the grantee to do or not to do, the clause cannot be said to be a covenant."

§ 258. **Condition Subsequent Distinguished from a Trust.**—For the same reason that the law favors a covenant rather than a condition subsequent—its dislike of forfeitures—it prefers to construe words qualifying the ownership of lands as trusts rather than conditions.

In *Stanley v. Colt*, 5 Wall. 119, 165, a condition is thus distinguished from a trust: "A condition, if broken, forfeits the estate, and forever thereafter deprives the society [the devisee] of the gift; and not only this, but the heirs become seised of the first estate, and avoid, of course, all intermediate charges and encumbrances, and take also free and clear all the expenditures and improvements that may have been laid out on the property. On the other hand, if these limitations are to be regarded as regulations to guide the trustees, and explanatory of the terms upon which the devise has been made, they create a trust which those who take the estate are bound to perform; and, in case of a breach, a court of equity will interpose and enforce performance." See also *Stuart v. Easton*, 170 U. S. 383, 402.

So strongly does the law favor a trust rather than a con-

dition that even the technical words of condition may be denied their ordinary meaning, and, if such appears to be the intention, construed as trusts. Thus in *Stanley v. Colt*, *supra*, it is said: "It is true the word 'proviso' is an appropriate one to constitute a common law condition in a deed or will, but this is not the fixed and invariable meaning attached to it by the law in these instruments. On the contrary, it gives way to the intent of the parties as gathered from an examination of the whole instrument, and has frequently been thus explained and applied as expressing simply a covenant or limitation in trust."

In this case, a devise to an ecclesiastical society, "provided that said real estate be not ever hereafter sold or disposed of," etc., was held, in connection with the other provisions of the will, to be a gift in trust, and not on condition. And the same result was reached where the words were "upon this express condition" (*Wright v. Wilkin*, 2 Best & Smith (110 E. C. L. R.) 232, 259); "in trust nevertheless and on condition always" (*Sohier v. Trinity Church*, 109 Mass. 1); "with this express limitation and condition" (*Mills v. Davison*, 54 N. J. Eq. 659; 35 L. R. A. 113).

In *Neely v. Hoskins*, 84 Me. 386 (24 Atl. 882), land was conveyed "upon the condition that it shall be forever for the use of the Protestant Episcopal Church at Old Town," and this was held to be, not a condition for the benefit of the grantor, but a trust which equity would enforce at the instance and for the benefit of the parish. The court said: "It is not expressed in the deed that the estate shall be revertible for any cause, but it is contended that the idea is implied. The term 'condition' does not necessarily import it. 'Condition' may mean 'trust,' and 'trust' mean 'condition,' oftentimes. The construction must depend on the context and any admissible evidence outside of the deed." And see *Jones v. Habersham*, 107 U. S. 174.

§ 259. Not Condition Subsequent When a Conveyance of Land is for a Particular Purpose.—It is almost universally

held that the expression in a conveyance of the use to be made of the land does not amount to a condition subsequent, though it may create a covenant or trust. The leading case on this subject is *Rawson v. School District*, 7 Allen (Mass.) 125 (83 Am. Dec. 670), where land was granted to a town "to their only proper use, benefit, and behoof, for a burying place forever." In an elaborate opinion by Bigelow, C. J., it was held that these words did not create a condition subsequent. And it was said:

"We believe there is no authoritative sanction for the doctrine that a deed is to be construed as a grant on a condition subsequent solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not inure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled."¹

¹ CONVEYANCES OF LAND FOR A PARTICULAR PURPOSE.—In a few cases, the expression of the purpose of a conveyance of land has been deemed to render a grant conditional. In *Hunt v. Beeson*, 18 Ind. 380, where land was donated "for a tan-yard," the court held that it was given on a condition subsequent. But see *Farnham v. Thompson*, 34 Minn. 331 (57 Am. Rep. 59), where it is said of *Hunt v. Beeson*: "That decision seems to have been made on the authority of *Hayden v. Stoughton*, 5 Pick. 258; and in the latter case there were technical words of condition."

In *Indianapolis, &c., R. Co. v. Hood*, 66 Ind. 580, a deed was made of lots to the company "for a site for the depot of said railroad at Peru, . . . to have and to hold the premises . . . for the purpose aforesaid;" and the court said: "The condition subsequent was, we think, clearly expressed in the deed under consideration, although the word 'condition' was not used therein. and it is very evident that this condition subsequent was the only consideration or inducement for the execution of the said deed." But see what is said of this case in *Sumner v. Darnall*, 128 Ind. 38 (13 L. R. A. 173).

In *Flaten v. City of Moorhead*, 51 Minn. 518 (53 N. W. 807), a deed, upon nominal consideration, was made to the village, and

The law as thus laid down is followed in many cases, among which may be cited the following, in which it was held that there was no condition subsequent: *Noyes v. St. Louis, &c., R. Co.* (Ill.), 21 N. E. 487 ("for the erection and maintenance thereon of the freight houses of the said companies"); *Sumner v. Darnall*, 128 Ind. 38; 13 L. R. A. 173 ("in consideration of the seat of justice having been permanently established at the town of Centreville, . . . for the use of the said county [of Wayne] forever"); *Kilpatrick v. Mayor of Baltimore*, 81 Md. 179; 48 Am. St. Rep. 509 ("unto the Mayor, etc., of Baltimore, etc., forever, as and for a street to be kept as a public highway"); *Long v. Moore*, 19 Tex. Civ. Ap. 363; 48 S. W. 43 ("for the purpose of a female academy"); *Fuquay v. Trustees* (Ky.), 58 S. W. 814 ("in consideration that the land has been selected as a proper place for erecting and building said academy, and as a permanent site for the same"); *Hunter v. Murfee* (Ala.), 28 So. 7 ("to have and to hold the aforegranted premises to

after the description of the premises were these words: "Said tract of land hereby conveyed to be forever held and used as a public park." The court held that the village did not take an absolute title (all that was necessary to decide for the disposition of the case), but did not determine "the precise nature of the estate conveyed, whether a mere easement was acquired by the village, or an estate on condition, or in trust." See this case criticised, and declared opposed to principle and authority, by Tyson, J., in *Hunter v. Murfee*, 126 Ala. 123 (28 So. 7).

Other cases which seem out of the line of the authorities are cited in *Hunter v. Murfee*, *supra*, and in note to *Farnham v. Thompson* (Minn.) 57 Am. Rep. 63. For an explanation of the cases of *Kirk v. Kirk*, 3 Pa. St. 436, and *Scheetz v. Fitzwater*, 5 Pa. St. 126, see *Stuart v. Easton*, 170 U. S. 383, 398; *Hunter v. Murfee* (Ala.) 28 So. 7, 9.

It has been stated above that words of exclusion ("for no other purpose," etc.) do not suffice to render a deed conditional. See what is said on this point in *Brown v. Caldwell*, 23 W. Va. 187, 191; *Stuart v. Easton*, 170 U. S. 383, 402; and in *Long v. Moore*, 19 Tex. Civ. App. 363 (48 S. W. 43, 45). But see *Hunter v. Murfee* (Ala.) 28 So. 7, 10.

the said trustees of Howard Collge, and their successors in office, to the use of Howard College”).

Nor will the use of express words of exclusion of any other than the designated use create a condition subsequent. This was held in the following cases: *Brown v. Caldwell*, 23 W. Va. 187 (“to use the aforesaid acre of land as a common burying ground, and for no other purpose, unless it be for erecting thereon a house for public Christian worship”); *Barker v. Barrows*, 138 Mass. 578 (“said lot of land to be used, etc., as a school house lot, and for no other purpose”); *Farnham v. Thompson*, 34 Minn. 331; 57 Am. Rep. 59 (“for the purpose of erecting a church thereon only”); *Raley v. Umatilla County*, 15 Or. 172; 3 Am. St. Rep. 142 (“for the special use and none other of educational purposes”); *Faith v. Bowles*, 86 Md. 13; 63 Am. St. Rep. 488 (“for a public school-house, as the property of the schools of said county, and for no other purpose”); *Ecroyd v. Coggeshall*, 21 R. I. 1; 79 Am. St. Rep. 741 (“but no buildings for any other municipal purpose than that of a city hall shall ever be erected on the granted premises”).

In *Ecroyd v. Coggeshall*, *supra*, the reasons for the decision are thus stated: “The clause in question contains no apt or proper words to create a condition. It simply declares that the land shall not be used for any other municipal purpose than that of a city hall. . . . There are no words relating to reëntry or forfeiture, but simply a declaration that the land conveyed shall not be used for any other purpose than that specified; and we know of no authority by which such a grant can be held to be on condition.”

§ 260. **Trust When a Conveyance is for a Particular Purpose.**—In many of the cases cited in the previous section, the action was in *ejectment* (or some other action *in rem*) by the grantor or his heirs to recover the land, on the theory of forfeiture for breach of condition subsequent; and it was sufficient to dispose of the case to decide that there was no such condition, without passing on the question of trust.

This was the case in *Rawson v. School District* (*supra*), where the court said (p. 674):

"If it be asked whether the law will give any force to words in a deed which declare that the grant is made for a specific purpose, or to accomplish a particular object, the answer is that they may, if properly expressed, create a confidence or trust, or amount to a covenant or agreement on the part of the grantee. . . . But whether this is so or not, the absence of any right or remedy in favor of the grantor, under such a grant, to enforce the appropriation of the land to the specific purpose for which it was conveyed, will not of itself make that a condition which is not so framed as to warrant in law that interpretation. An estate cannot be made defeasible on condition subsequent by construction founded on an argument *ab inconvenienti* only, or on considerations of supposed hardship or want of equity."¹

¹ TRUSTS IN DEVISES AND VOLUNTARY GRANTS.—In *Rawson v. School District* (Mass.), 83 Am. Dec. 670, it is said: "In devises a conditional estate may be created by the use of words which declare that it is given or devised for a particular purpose, or with a particular intention, or on payment of a certain sum." But in *Stanley v. Colt*, 5 Wall. 119, 165, it is said: "Mr. Sugden, speaking of conditions, observes that what by the old law was deemed a devise on condition, would now, perhaps in almost every case, be construed a devise in fee upon trust; and by this construction instead of the heir taking advantage of the condition broken, the *cestui que trust* can compel an observance of the trust by suit in equity."

As to voluntary grants, it is said in *Olcott v. Gabert*, 86 Tex. 123 (23 S. W. 985): "It may be that the consideration expressed should be deemed nominal, and the conveyance should be treated as voluntary, and it is true that a condition will be more readily implied in a deed of that character than in one which rests upon a valuable consideration. Yet the rule is well recognized that the mere declaration of the uses to which the granted premises are to be applied do not ordinarily import a condition.

"Where the declared purpose for which the property shall be used is a matter that will enure to the special benefit of the grantor, the courts are more inclined to treat the conveyance as conditional than when, as in this case, the use is for the benefit

In *Rawson v. School District*, the language of the court (at p. 675) seems to imply that there was no enforceable trust, but only a duty of imperfect obligation, to carry out the wishes of the grantor. And the same may be said of most of the cases cited in the previous section. On the other hand, in *Sohier v. Trinity Church, supra*, the court said: "Taking into consideration the title of the grantors, the purposes of the grant, and the fact that the expression is 'in trust nevertheless and on condition always,' the fair construction of the instrument is that the parties intended the title to be in trust." And see to the same effect, *Mills v. Davison*, 54 N. J. Eq. 659 (35 L. R. A. 113).

In *Brown v. Caldwell, supra*, the court say: "Taking into consideration the whole instrument, and the purposes of the grant, and the absence of any clause of reëntury or forfeiture, it seems to me that the grantor intended the title to be in trust, and not upon condition." In *Raley v. Umatilla County*,

of a special class of persons, or of the public at large. In this case it does not appear that the maintenance of a church upon the lot was a matter especially advantageous to the railroad company which made the grant." And see *Long v. Moore*, 19 Tex. Civ. App. 363 (48 S. W. 43); *Neeley v. Hoskins*, 84 Me. 386, § 258, *supra*; *Brown v. Caldwell*, 23 W. Va. 187.

In *Faith v. Bowles*, 86 Md. 13 (63 Am. St. Rep. 488) it is said: "The grant in the case now under consideration was not a gratuity, nor merely voluntary, but made for a full consideration of the estate conveyed. This being the case, and there being no qualifying terms indicating that the grantors intended to retain any benefit to themselves, or to impress upon the estate conveyed any restriction as to its alienation, we find nothing to justify the appellee's contention" [viz., that there was a condition subsequent]. And it would seem that there was no enforceable trust. But while the presence of a consideration may be potent against the intention to create either a condition or trust, it is not believed that its absence has very great weight in favor of such an intention. See *Kilpatrick v. Mayor of Baltimore*, 81 Md. 179 (48 Am. St. Rep.) 509, where the court say: "We are disposed to place but little importance upon the fact that the consideration in the deed is merely nominal." But see *Ecroyd v. Coggeshall*, 21 R. I. 1 (79 Am. St. Rep. 741).

supra, it is said, on rehearing: "If it were being so used [i. e., the land for other than "educational purposes"] it is probable that the heirs of the grantor have such an interest [presumably by way of covenant or trust] that they might restrain the unauthorized use of the thing granted."

In *Ecroyd v. Coggeshall*, *supra*, it is said (citing *Greene v. O'Connor*, 18 R. I. 60): "This language, at the most, only has the effect to create a confidence or trust in connection with the land conveyed, or to raise an implied agreement on the part of the grantee to use the land only for the purpose specified."

§ 261. Construction of Conveyances Providing for Support of the Grantor or a Third Person by the Grantee.—Such provisions depend for their construction upon the words used, and may assume the form of a true condition subsequent, a personal covenant, a covenant coupled with a charge or lien on the land, or both a condition and a covenant at the same time.¹

¹ CONSTRUCTION OF SUPPORT DEEDS.—In *Lohman v. Crawford*, 99 Va. 688, the language of a deed by aunt to nephew expressed the consideration as follows: "For and in consideration of the love and affection the said [grantor] has for the said [grantee], his remaining with her the said [grantor], the taking care of her so long as she may live, in sickness as well as in health, the payment of all her just debts that may be unpaid at her decease; and the further consideration of one dollar cash in hand paid, the receipt of which is hereby acknowledged." The court said:

"There are no words in the deed under consideration creating a condition subsequent, and nothing to suggest that such a condition was contemplated by the parties; nor is there a clause providing for a re-entry by the grantor. The provision in the deed that [the grantee] should remain with his aunt, and take care of her in sickness and in health so long as she lived was nothing more than a covenant on his part that he would render those services in consideration for the conveyance of the land to him."

But the court held that as the remedy at law on such a covenant was wholly inadequate, a court of equity would take jurisdiction, and would annul the deed, and put the parties in the same position they were in before it was made, citing *Wampler*

Thus in *Thomas v. Record*, 47 Me. 500 (74 Am. Dec. 500), the deed ran as follows: "I give the said [grantee] this deed on the following conditions, to-wit: the said [grantee] shall maintain and support myself [the grantor] and [the wife of

v. *Wampler*, 30 Gratt. 454. As to the jurisdiction of a court of equity to rescind an executed covenant under such circumstances, see 7 Va. Law Reg. 557, note to *Lohman v. Crawford*, by Prof. Lile, where it is said: "The ruling of the court may doubtless be justified on the ground of the peculiar character of the arrangement between the parties, and the impossibility of doing complete justice in cases of this sort except by rescission."

On the other hand, in *Glocke v. Glocke* (Wis.) 89 N. W. 118, where there was a conveyance of land by father to son in consideration of support, etc., the court gave the same relief as in *Lohman v. Crawford*, but not on the ground of right of rescission of a *covenant*, but by reason of the forfeiture incurred by the son by breach of a *condition subsequent*. This "condition subsequent," as is frankly confessed, was obtained "by rules of judicial construction peculiar to courts of equity;" and it is said:

"If any of the situations where equity, by construction so-called, may arbitrarily, if necessary, turn a transaction into something entirely different from what the parties thereto expressed in their writings in order to do justice, can be supported on principle, the one under consideration can." . . . "Such contracts have come to be looked upon as almost, if not quite, presumptively improvident in their inception, and in that view courts of equity have gone to great lengths to remedy the mischief by reading out of them a condition, when a covenant only is expressed, upon which may be founded on principle a right of rescission, where justice requires it for the protection of the weak, the exercise of which will undo the mischief *ab initio*, and restore the parties, substantially, to their original situation." And it is added:

"In such a case, the court does not lend its jurisdiction to effect a forfeiture. The forfeiture, or rescission, as it is sometimes called, is effected by the act of the grantor, by his reëntry, or its equivalent, for condition broken. Equity lends its aid to quiet the title. It lends its aid to set aside the conveyance. . . . It establishes the title to the property in accordance with the facts, and clears away all apparently interfering writings and records, giving such other relief as may be necessary to fully accomplish that end."

the grantor] during the time of their natural lives," etc.; and in construing it the court adopted the language employed in *Gray v. Blanchard*, 8 Pick. 284: "The words are apt to create a condition; there is no ambiguity, no room for construction; and they cannot be distorted so as to convey a different sense from that which was probably the intent of the parties." And it was added that the absence of a clause of reëntury in the deed did not affect the right of the grantor or his heirs to enter and take advantage of a breach of the condition. And see *Cross v. Carson*, 8 Blackf. (Ind.) 138 (44 Am. Dec. 742).

On the other hand, in *Weir v. Simmons*, 55 Wis. 639 (13 N. W. 873), the construction of a condition subsequent was rejected, although the deed contained express words of condition. The court said: "Whether a provision in a deed or will which, as a part of the consideration, requires the payment of money to third persons [or, of course, to the grantor] by the grantee or devisee therein, within a fixed time after the title and right of possession vest in him, will be construed to be a charge upon the land, or whether it will be construed to be a condition subsequent, depends on the intent of the parties to the conveyance, or of the testator in case of a devise; and it will always be construed to make a charge upon the premises, unless a different intent is clearly apparent, or in the case of a deed the language is so clear as to leave no room for construction or doubt."

So in the following cases the construction of support-deeds was held to be a charge on the land, and not a condition subsequent: *Pownal v. Taylor*, 10 Leigh, 172; 34 Am. Dec. 725 (approved in *Campau v. Chene*, 1 Mich. 400. And see *Bates v. Swiger*, 40 W. Va. 420; 21 S. E. 874); *Meyer v. Swift*, 73 Tex. 367 (11 S. W. 378); *Richards v. Reeves*, 149 Ind. 427 (47 N. E. 232); *McClure v. Cook*, 39 W. Va. 579 (20 S. E. 612). And see *Studdard v. Wells*, 120 Mo. 25 (25 S. W. 201), where the language was: "The said [grantee] is to pay the taxes on the said land, and has to support the said [grantors] during their natural life-time." The court said: "No apt or appropriate words to create a condition are used; nor is there

any clause of forfeiture, or reëntry, or reverter. We are unable to find anything in this deed, whether we treat it as a gift or made for a money consideration, which will justify us in saying it is a deed upon condition subsequent." As the action was ejectment, it was unnecessary to decide whether the obligation of support, called by the court a "stipulation," constituted a charge on the land.

For an example of a support-deed construed to contain a merely personal covenant, not operating as a specific lien on the property, see *Taylor v. Lanier*, 3 Murphy (N. C.) 98 (9 Am. Dec. 599). For an example of such deed containing both a covenant and condition subsequent, thereby giving the grantee the double remedy of action on the covenant or entry for breach of condition, see *Jackson v. Topping*, 1 Wendell (N. Y.) 388 (19 Am. Dec. 515).

§ 262. **Construction of Deeds Containing Building Restrictions.**—Such restrictions are lawful (see § 266, note), and may be imposed by way of condition subsequent, covenant, or reservation. And the effect of these may be to give a right merely personal to the grantor, or to create a right in the nature of an easement, appurtenant to land retained by the grantor, and enforceable by any owner of such land against the grantee, or against his assignees with notice actual or constructive. For full discussion of building restrictions, see 5 Am. & Eng. Ency. Law (2d ed.), p. 2; and note to *Ladd v. City of Boston*, 21 Am. St. Rep. 484–508. It is proposed here to give a few illustrations of the form such restrictions may assume, and their effect *inter partes*, and as to third persons.¹

¹ BUILDING RESTRICTIONS. BY AND AGAINST WHOM ENFORCEABLE. —(1) BY WHOM. As stated in the text, this depends, not on the form of the restriction, but on the intent of the grantor. If this be to make a restriction for his personal benefit, then it does not enure to the benefit of others; if for the benefit of land retained by him, then it may be enforced by those who succeed to him in the ownership of such land. And even though he disposes of all his land at one time, yet if it be divided into parcels, and con-

In *Gray v. Blanchard*, 8 Pick. (Mass.) 283, a deed conveying land in fee-simple contained this restriction: "Provided, however, that this conveyance is upon the condition that no windows shall be placed in the north wall of the house aforesaid, or of any house to be erected on the premises, within thirty years from the date hereof." The court said:

conveyed to different purchasers by restrictive deeds, in pursuance of a general plan, the intent may be to give mutual rights, in the nature of easements, to all such purchasers, and they will be enforceable in equity by and against one another accordingly. As is said by Bigelow, C. J., in *Parker v. Nightingale*, 6 Allen (Mass.) 341 (83 Am. Dec. 632):

"The effect of such restrictions, inscribed in contemporaneous conveyances of the several parcels, under the circumstances alleged in the bill, was to confer on each owner a right or interest in the nature of a servitude, in all the lots situated on the same street, which were conveyed subject to the restriction. Thus it entered into the consideration which each purchaser paid for his land, either by enhancing its price in view of the benefit secured to him in the restraint imposed on adjoining owners, or in lessening its value in consequence of the limitation affixed to its use."

For cases in which the restriction was held *personal to the grantor*, see *Badger v. Boardman*, 16 Gray (Mass.) 559; *Jewell v. Lee*, 14 Allen (Mass.) 145 (92 Am. Dec. 744); *Sharp v. Ropes*, 110 Mass. 381; *Skinner v. Shepard*, 130 Mass. 180; *Mulligan v. Jordan*, 50 N. J. Eq. 363 (24 Atl. 543); *Summers v. Beeler*, 90 Md. 474 (78 Am. St. Rep. 446); *Safe Deposit, &c., Co. v. Flaherty*, 91 Md. 489 (46 Atl. 1009).

For cases in which the restriction was held *not personal to the grantor*, see *Barrow v. Richard*, 8 Paige Ch. 351 (35 Am. Dec. 713); *Whitney v. Union R. Co.* 11 Gray (Mass.) 359 (71 Am. Dec. 715); *Gibert v. Peteler*, 38 N. Y. 165 (97 Am. Dec. 785); *Halle v. Newbold*, 69 Md. 270 (14 Atl. 662); *Graves v. Deterling*, 120 N. Y. 447; *Ladd v. City of Boston*, 151 Mass. 585 (21 Am. St. Rep. 481); *Graham v. Hite*, 93 Ky. 481 (20 S. W. 506); *Roberts v. Porter*, 100 Ky. 130 (37 S. W. 485).

2. AGAINST WHOM. Of course, if a restrictive covenant runs with the land, it is binding on all who succeed to the title, whether they have notice of it or not. As to when such covenants do or do not run with the land, see 5 Am. & Eng. Ency. Law (2d ed.) 3; note to *Morse v. Garner*, 47 Am. Dec. 574. But it is not necessary in order to render a restrictive covenant enforceable

“‘This conveyance is upon the condition’ can mean nothing more nor less than their natural import; and we cannot help the folly of parties who consent to take estates upon onerous conditions, by converting conditions into covenants.” And for a breach of the condition, by placing two windows in the north wall, it was held that the grantor was entitled to enter and enforce a forfeiture, and this against a successor in title to the grantee. The court said: “It is a harsh proceeding on his part, but it is according to his contract, which must be enforced if he insists on it.”

So in *Clapp v. Wilder*, 176 Mass. 332, where the grantor owned two adjoining lots—lot A, on which was a store building, and lot B, on which was his dwelling—the deed of lot

against a purchaser with notice that it should run with the land. In the language of Bigelow, C. J., in *Whitney v. Union R. Co.* 11 Gray, 359 (71 Am. Dec. 715):

“By taking an estate from a grantor with notice of a valid agreement made by him with the former owner of the property concerning the mode of occupation and use of the estate granted, the purchaser is bound in equity to fulfil such agreement with the original owner, because it would be unconscientious and inequitable for him to set aside and disregard the legal and valid acts and agreements of his vendor in regard to the estate, of which he had notice when he became its purchaser. In this view the precise form or nature of the covenant or agreement is quite immaterial. It is not essential that it should run with the land. A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands as assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform.”

And see *Parker v. Nightingale*, *supra*; *Hodge v. Sloan*, 107 N. Y. 244; note to *Ladd v. City of Boston*, 21 Am. St. Rep. 486-7; *Tardy v. Creasy*, 81 Va. 553, dissenting opinion of Lewis, P. That notice to the purchaser may be actual or constructive, see 5 Am. & Eng. Ency. Law, 9; Appeal of Townsend, 68 Conn. 358 (36 Atl. 815); *Quatman v. McCray*, 128 Cal. 285 (60 Pac. 855). On the whole subject of notice, see note to *Lodge v. Simonton*, 23 Am. Dec. 47-53; note to *Parker v. Conner*, 45 Am. Rep. 184-190.

A read as follows: "And this conveyance is made upon the express conditions that the said Wilder and Hills [the grantees], their heirs and assigns, shall never erect any building nearer the street line of said land [lot A] than the store building now thereon." Afterwards the grantor sold lot B, and its owner asked for an injunction to restrain the owner of lot A from erecting a building twenty feet nearer the line, in breach of the restriction; but it was held (three judges dissenting) that the restriction was a condition, and not a covenant, and moreover that the condition was made solely for the personal benefit of the grantor, and not for the benefit of the adjoining lot (B) retained by him. It was declared that the only remedy for this breach was an entry by the grantor or his heirs or devisees, and the injunction was refused.

On the other hand, the cases are numerous in which the restriction, even though couched in the form of a condition, has, from the terms of the grant, or from the situation and the surrounding circumstances, been construed as in effect a covenant, and as intended for the benefit of the other land of the grantor retained by him, and so available, as an equitable easement, for and against the purchasers of such land.

Thus in *Ayling v. Kramer*, 133 Mass. 12, it is said by Morton, J.: "We are of opinion that the so-called conditions in the deed of Carter were not intended or understood by the parties to be technical conditions, a breach of which would work a forfeiture of the estate. They were intended to regulate the mode in which the grantee might use and enjoy the land, and are to be construed as restrictions . . . imposed as a part of a general scheme of improvement, which might be enforced in equity by the owners of the adjoining estates, and created equitable easements, which constituted a breach of the covenants against encumbrances." And see *Beals v. Case*, 138 Mass. 138; *Hopkins v. Smith*, 162 Mass. 444; *Cassidy v. Mason*, 171 Mass. 507; *Post v. Weil*, 115 N. Y. 361 (12 Am. St. Rep. 809); *Clark v. Martin*, 49 Pa. St. 289; *Watrous v. Allen*, 57 Mich. 362 (24 N. W. 104).

For an example of a restriction by reservation, see *Peck v. Conway*, 119 Mass. 546, where the words were: "With this express reservation, that no building is to be erected by the said Joseph B [grantee], his heirs or assigns, upon the land herein conveyed." It was held that this restriction was for the benefit of the land retained by the grantor and enforceable by a subsequent purchaser of such land. The court said: "A prohibition against building on the land sold would be obviously useful and beneficial to this lot [that retained], giving it the benefit of better light and air and prospect; this is its apparent purpose, while it would be of no appreciable advantage for any other purpose. The fair inference is that the parties intended to create this easement or servitude for the benefit of the adjoining estate. We are therefore of opinion that it was not a mere personal right in Ensign [the grantor], but an easement appurtenant to the estate which he conveyed to the plaintiff."

§ 263. Construction of Deeds Prohibiting the Sale, etc., of Intoxicating Liquors on the Premises.—Such prohibitions are lawful (see § 266, note), and may be in the form of a condition subsequent (the usual case) or of a covenant. In *Watrous v. Allen*, 57 Mich. 362 (58 Am. Rep. 363) the prohibition was in this form, an unmistakable condition:

"Provided always, and this contract [conveyance] and the estate in said premises hereby created is subject to the express condition that if the parties of the second part, their heirs and assigns, shall at any time sell or keep for sale upon said above granted premises, or knowingly permit any person under them so to sell or keep for sale, any spirituous or intoxicating liquors, whether distilled or fermented, the entire title and estate in and to said premises hereby sold and created shall cease; and the title to the said premises shall thereupon at once revert to and vest in the parties of the first part, their heirs and assigns forever; and [it] shall be lawful for the said parties of the first part, their heirs and assigns, to reënter upon the said premises, and said parties of the

second part, their heirs and assigns, and every person claiming under him or them, wholly to remove, expel or put out."

For iron-clad conditions almost identical with the above, see *Smith v. Barrie*, 56 Mich. 314 (58 Am. Rep. 391); *Jenks v. Palowski*, 98 Mich. 110 (39 Am. St. Rep. 522). For other cases of conditions subsequent in varying forms, see *Plumb v. Tubbs*, 41 N. Y. 442; *Cowell v. Springs Co.* 100 U. S. 55; *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36 (4 L. R. A. 373); *Sioux City, &c., R. Co. v. Singer*, 49 Minn. 301 (32 Am. St. Rep. 554; 15 L. R. A. 751); *Odessa, &c., Co. v. Dawson*, 5 Tex. Civ. App. 487 (24 S. W. 576).

On the other hand, in *Sutton v. Head*, 86 Ky. 156 (9 Am. St. Rep. 274), the deed contained this clause, which was held to be a covenant running with the land: "No intoxicating liquors are to be sold on said premises in less quantities than five gallons." And in *Post v. Weil*, 115 N. Y. 361 (12 Am. St. Rep. 809; 5 L. R. A. 422), though the deed contained apt words of condition, viz.: "Provided always and these presents are upon this express condition, that the aforesaid premises shall not, nor shall any part thereof, or any buildings thereon erected or to be erected, be at any time hereafter used or occupied as a tavern or public house of any kind," it was held that this was a covenant running with the land, and not a "condition subsequent." And see *Atlantic Dock Co. v. Learitt*, 54 N. Y. 35 (13 Am. Rep. 556); *Hall v. Solomon*, 61 Conn. 476 (29 Am. St. Rep. 218).

§ 264. **Void Conditions; Precedent or Subsequent.**—A condition may be void by reason of (1) impossibility, (2) illegality, (3) repugnancy, or (4) uncertainty.

As to the effect of a void condition, the law makes a sharp discrimination according as the condition is precedent or subsequent. If the void condition be precedent, the estate contingent thereon is also void, and the grantee shall take nothing by the grant; for an estate can neither commence nor increase on a void condition. On the other hand, if the void condition be subsequent, the condition only is void, and the

estate already vested in the grantee is absolute and indefeasible. The general principle is thus stated by Riely, J., in *Burdis v. Burdis*, 96 Va. 81:

"The law is clear that where a condition precedent is annexed to a devise of real estate, and its performance is or becomes impossible, the devise fails, although there is no default or laches on the part of the devisee himself; but if the condition is subsequent, and its performance becomes impossible, the rule is different. In that case, the estate will not be defeated or forfeited, but the devisee will hold the property by an absolute title, as if no condition had been annexed to the devise."

The law is the same as to a deed, and this whether the condition be void for impossibility, or for any other reason. See on the whole subject, 2 Tho. Co. 18-21; Shepp. Touch. 132-3; 1 Prest. Est. 476; 2 Bl. Com. 156-7; 2 Min. Ins. (4th ed.) 279; 6 Am. & Eng. Ency. Law, 506; *Vanhorne v. Dorrance*, 2 Dall. (Pa.) 304, 317; *Myers v. Daviess*, 10 B. Mon. (Ky.) 394; *Davis v. Gray*, 16 Wall. 203, 229; note to *Burdis v. Burdis* (Va.) 70 Am. St. Rep. 829-837; *Ellicott v. Ellicott*, 90 Md. 321 (45 Atl. 183; 48 L. R. A. 58).

§ 265. **Conditions Void Because Impossible.**—In this case the difference in effect between a condition precedent and subsequent is thus stated by Preston (*Estates*, p. 476): "It is necessary that the event should happen to give a title under this contingent or conditional limitation [*i. e.*, grant on a condition precedent]. Though the event on which the estate is to vest should become impossible by the act of God, yet the gift would fail; while if a condition be annexed to an estate already vested [grant on condition subsequent], and the condition became impossible, the estate would be discharged from the condition, and become absolute."

Under the above doctrine, it matters not whether the impossibility exists at the time of the grant, or arises afterwards; or whether it exists in the nature of things, as a natural impossibility, or is caused by the act of God, by the law,

or by the conduct of a third person. As to the parties to the grant, the grantee may be excused from the performance of a condition subsequent by the conduct of the grantor; but if the grantee should cause the impossibility of a condition subsequent imposed on him, he could not thus excuse its non-performance (6 Am. & Eng. Ency. Law, 506). And it has been held that if the grantor who has imposed a condition precedent renders its performance unnecessary or impossible, this excuses it, and the estate in the land shall vest in the grantee without performance. *Jones v. Chesapeake, &c., R. Co.*, 14 W. Va. 514, 523. See, *contra*, 2 Min. Ins. 265, 279.¹

¹ PERFORMANCE OF CONDITION PRECEDENT MADE IMPOSSIBLE BY THE GRANTOR.—In *Jones v. Chesapeake, &c., R. Co.*, *supra*, it is said: "But whether the condition be precedent or subsequent, if the act of the party who imposed the condition makes its performance unnecessary or impossible, the condition is no longer binding, and the estate conveyed by the deed in which it is contained is discharged therefrom."

This case is the only one found by the writer in which it has been held that an estate in land granted on a condition precedent can vest and take effect without performance of the condition. The action was ejectment, and the defence was that, though the condition precedent on which the land was granted for right of way to the railway company had not been performed, its performance had been rendered unnecessary by the act of the grantor himself. The condition was that the grantee should first procure the assent to the grant of a third person, to whom the grantor had already contracted to convey the land. But the grantor himself obtained an abandonment of the contract by the third person; and it was held that this rendered the condition of no force, that its performance was unnecessary for the security of the grantor, and that the estate vested in the grantee free from condition.

It will be observed that in this case the condition did not, strictly speaking, become impossible; for the third person's consent might still have been obtained, however unnecessary after he had ceased to have an interest in the land. And a distinction might be suggested between a condition precedent, still perhaps of vital importance, rendered impossible by the grantor, and a case in which the act of the grantor rendered the condition useless, and its performance an idle ceremony. In such case the

For an example of a condition precedent whose performance was made impossible by the act of God, see *Den v. Messenger*, 33 N. J. Law. 499. Here the devise was as follows: "After the death or upon the marriage of my said wife, I do give, devise, and bequeath all the estate real and personal hereinbefore given to my said wife to Henry Clew, . . .

condition might be said to have ceased to exist, as being itself conditioned on the continuance of the situation which caused it to be imposed.

But if a condition precedent has not ceased to exist, it is said by Preston (*Estates*, 476) that even a release by the grantor will not cause the estate to vest. "As the condition or contingency must happen before the grantee can have any right, a release, or any other act of the grantor or his heirs, except a *new conveyance*, will not complete the title." And see 2 Tho. Co. (18).

In *Jones v. Chesapeake, &c., R. Co.*, however, no distinction is taken according as the grantor's act renders performance impossible or unnecessary. And in note to *Burdish v. Burdish*, 70 Am. St. Rep. 831, this case is cited with approval. And see 2 Tuck. Com. (97), where it is said: "When a condition, whether precedent or subsequent, becomes impossible by the act of the party creating it, the estate becomes absolute."

In *Jones v. R. Co.*, *supra*, only two cases are relied on by the court, viz., *Jones v. Bramblet*, 1 Scam. (Ill.) 276, a case of condition subsequent, and *Young v. Hunter*, 6 N. Y. 203, a case of condition precedent annexed to a contract. As to contracts, there is no doubt that the law is that he who prevents the performance of a condition precedent excuses it, and is liable as if performance had been made. *Jones v. Walker*, 13 B. Mon. (Ky.) 163; *Baltimore, &c., R. Co. v. Polly*, 14 Gratt. 447; *McCormick v. Hamilton*, 23 Gratt. 561. If the law as to contractual rights is applicable to the vesting of estates, on the ground of estoppel or otherwise, there is no difficulty in allowing the estate to vest when the grantor prevents performance of a condition precedent, on the ground that he will not be heard to say that the condition was not performed. And see Shepp. Touch. 133, where it is said in an interpolation by Preston: "But in cases of conditions precedent, the grantor cannot, merely by his own act, as refusal to accept money tendered, prevent the estate from vesting; tender and refusal would be tantamount [so far as performing the condition is concerned] to payment."

upon the express condition that he, the said Henry Clew, do remain with me and my wife during our lives, and the life of the survivor of us, and continue to conduct himself in a proper manner." It was held that the condition was precedent; and as its performance by Henry Clew was made impossible by his death in the lifetime of the widow, no estate vested in him, and the testator's heir took the land. And see *City of Stockton v. Weber*, 98 Cal. 441 (33 Pac. 332).

The cases in which impossibility of performance of a condition subsequent has made the estate absolute in the grantee or devisee are numerous. See *Nunnery v. Carter*, 5 Jones Eq. (N. C.) 370 (78 Am. Dec. 231); *Parker v. Parker*, 123 Mass. 584; *Burdis v. Burdis*, 96 Va. 81 (condition subsequent of support by devisee of third person excused by death of such person in lifetime of the testator. § 251, note); *Leonard v. Smith*, 80 Ia. 194 (45 N. W. 762 (condition subsequent of furnishing "pleasant home" made impossible by the conduct of the grantor himself); *Bryant v. Dungan*, 92 Ky. 626 (36 Am. St. Rep. 618) (condition subsequent of support, etc., of grandmother made impossible by her refusal to accept); *Harrison v. Harrison*, 105 Ga. 517 (70 Am. St. Rep. 60) (condition subsequent that one devisee "remain on place" made impossible by the cruelty of co-devisee). And see *Davis v. Gray*, 16 Wall, 202-30 (impossibility due to war); *Ricketts v. Louisville, &c.. R. Co.* 91 Ky. 221 (34 St. Rep. 176) (alleged want of legal ability); *Union Pac. R. Co. v. Cook*, 98 Fed. 281 (certain use of lot excused because lot washed away by river).

§ 266. **Conditions Void Because Unlawful.**—When such a condition is precedent, no estate can vest in the grantor *without* performance, for this would ignore the condition; nor can it vest *by* performance, for such performance is against the law. When, however, the condition is subsequent, the condition is void, and the estate of the grantee absolute. As stated in 2 Tucker's Commentaries (93):

"The object of the principle is to remove all temptation to

the illegal act. Thus in the case of a condition precedent, if I grant to a man that if he commits a murder he shall have a fee, the *estate granted* as well as the condition is void; and though the grantee should perform the condition by committing the murder, he could not demand the estate. Thus, then, the temptation to the sin is removed, because he cannot recover the wages of his iniquity, even if he does the deed. On the other hand, in case of a condition subsequent, if I give to A an estate in fee on condition that unless he kills B, the gift shall be void; here the estate being deemed absolute, and the condition only being void, the temptation to commit the crime is removed by *assuring the estate to the grantee* whether he perform the condition or not; and at the same time the grantor loses what he had given with vicious intention, and fails in the attainment of his illegal purpose."¹

¹ CONDITIONS LAWFUL OR UNLAWFUL.—It is well settled that conditions forbidding the sale, manufacture, etc., of intoxicating liquors on the premises conveyed are lawful, and not repugnant to the grant, nor in unreasonable restraint of trade. See *Plumb v. Tubbs*, 41 N. Y. 442; *Smith v. Barrie*, 56 Mich. 314 (56 Am. Rep. 391); *Sioux City, &c., R. Co. v. Singer*, 40 Minn. 301 (32 Am. St. Rep. 554); *Cowell v. Springs Co.*, 100 U. S. 55.

But in *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36 (4 L. R. A. 373) it is held that such a condition will not be enforced when inserted for a dishonest purpose, and to the end that the grantor may obtain a monopoly in the business, and others be restrained therefrom. And see *Jenks v. Palowski*, 98 Mich. 110 (39 Am. St. Rep. 522).

As to building restrictions, they were attacked in *Gray v. Blanchard*, 8 Pick. (Mass.) 283, as being idle and useless, and so against the policy of the law, and also as being repugnant to the estate granted. But these objections were not sustained. And see *Whitney v. Union, &c., R. Co.*, 11 Gray (Mass.) 359 (71 Am. Dec. 715), where it is said:

"Every owner of real property has the right so to deal with it as to restrain its use by his grantees within such limits as to prevent its appropriation to purposes which will impair the value, or diminish the pleasure of the enjoyment, of the land which he retains. The only restriction on this right is that it be

The above principles are so well settled that citation of authority is hardly necessary. They are recognized as to conditions precedent in *Ransdell v. Boston*, 172 Ill. 439 (43 L. R. A. 526), where, however, the condition precedent (procurement of divorce in a *pending* suit) was held not illegal.

For examples of illegal conditions subsequent held to be void, and not to affect the estate already vested, see *Board, &c. v. Young*, 59 Fed. 96; *Scovill v. McMahon*, 62 Conn. 378 (36 Am. St. Rep. 350); 21 L. R. A. 58 (condition subsequent, as to use of land for cemetery, made illegal by law forbidding further interment therein); *Conrad v. Long*, 33 Mich. 78 (condition subsequent in a devise to a married woman that she shall not live with her husband); *Maddox v. Maddox*, 11 Gratt. 804 (bequest on condition subsequent of religious qualification). And see *Trumbull v. Gibbons*, 2 Zab. (N. J.) 117 (51 Am. Dec. 253).

For instances of unlawful conditions in restraint of marriage, or of alienation of land, see § 268 and § 270, *infra*.

§ 267. Conditions Void Because Repugnant or Uncertain.—Under repugnancy (a branch of restraint on alienation, to be treated separately hereafter) two cases may be cited of void conditions subsequent.

exercised reasonably, with due regard to public policy, and without creating any unlawful restraint of trade." And see note to *Ladd v. City of Boston* (Mass.) 21 Am. St. Rep. 481. As to unlawful restraint of trade, see *Tardy v. Creasy*, 81 Va. 553.

In several of the Western States, there are statutes as to "nominal" conditions, as follows: "When any conditions annexed to a grant or conveyance of lands are merely nominal, and evince no intention of actual or substantial benefit to the party to whom, or in whose favor, they are to be performed, they may be wholly disregarded, and a failure to perform the same shall in no case operate as a forfeiture of the lands conveyed subject thereto." For the construction of this statute, see *Smith v. Barrie*, 56 Mich. 314 (56 Am. Rep. 391); *Sioux City, &c., R. Co. v. Singer*, 49 Minn. 301 (32 Am. St. Rep. 554).

As to conditions in restraint of marriage and of alienation of land, see §§ 268, 270, *infra*.

In *Moore v. Sanders*, 15 S. C. 446 (40 Am. Rep. 703) the testatrix devised land to her son in fee-simple and then provided, by a "divided clause," as follows: "But should he die without leaving a will, then the whole to go to my grandchildren, share and share alike." It was held that the condition was void for repugnancy, and the son's estate absolute.

The court said:

"The performance of the condition would require Moore [the son] to die in possession of the real estate devised to him. In no other way could he leave a will disposing of it. The condition is then in direct and positive restriction on his power of alienation. The will invests him with a fee, but the condition strikes at the very substance of the fee, and if valid would take away and destroy its most essential and important quality—the power of sale. A fee may be defeated by a condition which is independent of the estate granted, upon the happening of which the estate is lost; but a condition the effect of which is to cut down the fee to a less estate is void because repugnant to the fee."

In *Hardy v. Galloway*, 111 N. C. 519 (32 Am. St. Rep. 828), it is said of a condition subsequent: "The restriction is certainly inconsistent with the ownership of the fee, as well, as it would seem, against public policy. The right to repurchase is of indefinite extent as to time (it being reserved to the grantors, their heirs, and assigns), and may be exercised whenever the property is sold, although no amount is fixed upon as purchase-money. In other words, we have an estate in fee without the power to dispose of or encumber it unless first offering it, for no definite price, to the grantors, their heirs, and assigns. The condition is repugnant to the grant, and therefore void."

As to uncertainty, it was contended by counsel in *Cassem v. Kennedy*, 147 Ill. 664 (35 N. E. 738) that a condition precedent was void for that reason, and so the estate devised on such condition became absolute. The court held that the condition was valid, and, being precedent, the estate could not vest without performance; but it was declared that, even

if the condition had been void for uncertainty, the result would have been the same, and the estate void, as in other cases of void conditions precedent. The court said:

"If, as contended, the language of the testatrix, in expressing the conditions on which the gift was made, is so uncertain as to render those conditions void, it is difficult to see how the devise can be upheld. That the testatrix did not intend to make the gift without conditions is as clearly expressed as the gift itself."

On the other hand, in *Martin v. Ballou*, 13 Barb. (N. Y.) 119, it was contended that the words "by his paying to the other heirs the sum of ———," attached to several devises of land, constituted a condition precedent, and being void for uncertainty prevented the vesting of the estates. The court, however, construed the condition (if any at all) to be subsequent, and upheld the devises, saying: "If the condition was subsequent, the cases before cited show that if it is or becomes impossible, the estate will not be defeated or forfeited. An impossible condition [subsequent] is the same as none; it is void, and there can be no breach. It leaves the will the same as if the void clause or sentence was stricken out, and then of course it devises an absolute estate in fee simple." And see *Brothers v. McCurdy*, 36 Pa. St. 407 (78 Am. Dec. 388).

§ 268. **Conditions in Restraint of Marriage.**—For the law on this subject, see 2 Jarman on Wills (6th Am. ed. by Bigelow) (885), *et seq*; 2 Pom. Eq. (2nd ed.) § 933; note to *Coppage v. Alexander* (Ky.), 38 Am. Dec. 156-161; note to *Chapin v. Cooke* (Conn.), 84 Am. St. Rep. 147-152; note to *Phillips v. Ferguson* (Va.), 1 L. R. A. 837.

Conditions in restraint of marriage may be valid or void; they may be precedent or subsequent; and they may be attached to gifts of realty or personalty. In the main, the doctrines already stated as to valid or void conditions are applicable to those in restraint of marriage; but there are notable diversities when such conditions are annexed to be-

quests of personalty. This, as has been often pointed out, is due to the influence of the civil law (by which legacies were governed), which declared all conditions in restraint of marriage void; whereas by the common law such conditions are valid, unless the restraint imposed is total or unreasonable. In the language of Pomeroy: "The system which has been developed [as to legacies] is a partial compromise between the technical common law rules concerning conditions, and the doctrines of the Roman law which made void all attempts to restrict the perfect freedom of marriage; and, like most compromises, it has some incongruous features." 2 Pom. Eq., § 933. And see *Scott v. Tyler*, 2 Bro. Ch. 432; *Stackpole v. Beaumont*, 3 Ves. Jr. 89; *Hogan v. Curtin*, 88 N. Y. 162.¹

¹ REASONABLE OR UNREASONABLE RESTRAINT OF MARRIAGE BY THE COMMON LAW.—See 2 Jarm. Wills (Bigelow's ed.) (885) *et seq.*; 2 Pom. Eq. (2nd ed.) § 933; note to *Coppage v. Alexander* (Ky.), 38 Am. Dec. 156.

A *total* restraint of marriage is considered reasonable when imposed on a widow or widower (as to whom see below); but in all other cases such restraint is unreasonable and void. There are *dicta*, however, to the effect that no restraint of marriage is void when attached to a gift of land (see *Com. v. Stauffer*, 10 Pa. St. 350 (51 Am. Dec. 489); *Cornell v. Lovett*, 35 Pa. St. 100; *Chapin v. Cooke*, 73 Conn. 72 (46 Atl. 282)); but it may now be considered as settled (at least outside of Pennsylvania and Connecticut) that the policy of the law forbids a total restraint of marriage (unless a second marriage), whether attached to realty or personalty. See authorities at the beginning of this note, and also *Mann v. Jackson*, 84 Me. 400 (30 Am. St. Rep. 358); *Smythe v. Smythe*, 90 Va. 633; *Jones v. Jones*, 1 Q. B. D. 279.

But though the restraint on marriage be *partial*, it will still be void unless it is reasonable. In *Phillips v. Ferguson*, 85 Va. 509, 513, it is said: "No inflexible rule on the subject is deducible from the cases, many of which are irreconcilable. The law, however, as we have seen, recognizes as valid those conditions in restraint of marriage which are just, fair, and reasonable; and what is such a condition must, to a great extent, be determined upon the circumstances of each particular case." And in *Maddox v. Maddox*, 11 Gratt. 804, 808, it is said: "Where they are of so rigid a character, or made so dependent on peculiar circum-

The departures in the law of legacies from the common-law rules as to conditions relate to the effect (1) of a condition precedent, void as in total or unreasonable restraint

stances, as to operate [as] a virtual though not a positive restraint on marriage, or unreasonably restrict the party in the choice of marriage, they will be ineffectual and utterly disregarded."

Upon these principles, in *Phillips v. Ferguson*, *supra*, it was held that a condition imposed by the will of a father that his daughter should not marry "in T. W. Phillips' family" was reasonable and valid. But in *Maddox v. Maddox*, *supra*, a condition was held void which forbade a woman to marry any one except a member of the Society of Friends (Quakers), there not being more than five or six marriageable male members of the Society in the neighborhood. And in this case, the English cases of *Houghton v. Houghton*, 1 Molloy, 612 (valid condition "not to marry contrary to the order and established rules of the people called Quakers") and *Perrin v. Lyon*, 9 East 170 (valid condition not to marry a Scotchman) are spoken of as perhaps inapplicable in a new country like the United States. The decision in *Maddox v. Maddox* is also placed on the ground that the condition (in effect) that the legatee should remain a member of a certain religious sect was contrary to the policy of Virginia as to religious freedom.

In *Reuff v. Coleman*, 30 W. Va. 171 (3 S. E. 597), a condition that a girl should not marry under twenty-one is sustained; and in *Young v. Furse*, 8 De G., McN. & G. 756, a condition that a daughter should not marry before twenty-eight is upheld. And in *Hogan v. Curtin*, 88 N. Y. 162, a condition reducing a legacy from \$16,000 to \$5,000, "in the event of my said daughter, Mary Ann, marrying against the consent of my said executors and her said mother," was held valid, and that the consent of the executors alone was insufficient.

On the other hand, a condition that a woman should not marry until the age of fifty, would be unreasonable and void. 1 Story, Eq., § 253. So, too, it is unreasonable to prescribe that a woman shall not marry a man unless he is seised of an estate in fee-simple, or of freehold property of the yearly value of £500 sterling. *Keiley v. Monck*, 3 Ridg., P. C. 205. So it has been held a void condition that a woman should not marry a man of a particular profession (1 Eq. Cas. Abr. 110); but in *Jenner v. Turner*, 16 Ch. D. 188 (37 Moak 139) a condition imposed by a sister on

of marriage; and (2) of a condition subsequent, valid as in partial and reasonable restraint of marriage.

In the first case, as has been seen, it is the doctrine of the common law, that though a condition precedent be void, yet the estate is also void, and the grantee or devisee takes nothing. But in a bequest of personalty, though the condition precedent in restraint of marriage be void, the legacy is not void, and the bequest takes effect as if the condition had not been imposed. This is by the rule of the civil law which (in direct opposition to the common law) treats a void condition, even though a precedent, as a nullity, and a gift so conditioned as absolute. *Maddox v. Maddox*, 11 Gratt. 804; *Phillips v. Ferguson*, 85 Va. 509 (17 Am. St. Rep. 78); *Hawke v. Euyart*, 30 Neb. 149 (27 Am. St. Rep. 391); *Ransdell v. Boston*, 172 Ill. 439 (43 L. R. A. 526); note to *Nunnery v. Carter* (N. C.), 78 Am. Dec. 234-6.

The second departure referred to above is known as the doc-

a brother that he should not marry "a domestic servant, or a person who has been a domestic servant," was sustained, following *Perrin v. Lyon*, *supra*.

As to *second marriages* it is now settled that a condition in total restraint is valid, equally as to a widow and widower; and this whether the restraint imposed is by one spouse on the other, or by a third person on either. See authorities cited at the beginning of this note, and also *Allen v. Jackson*, 1 Ch. D. 399 (15 Moak, 815); *Newton v. Marsden*, 2 J. & H. 356; *Coppage v. Alexander*, 2 B. Mon. (Ky.) 313 (38 Am. Dec. 153); *Com. v. Stauffer*, 10 Pa. St. 350, 51 Am. Dec. 489 (decision, however, placed by court on other and untenable ground); *Dumey v. Schœffler*, 24 Mo. 170 (69 Am. Dec. 422); *Little v. Birdwell*, 21 Tex. 597 (73 Am. Dec. 242); *Bostick v. Blades*, 59 Md. 231 (43 Am. Rep. 548); *Bennett v. Packer*, 70 Conn. 357 (39 Atl. 738); *Chapin v. Cooke*, 73 Conn. 72 (46 Atl. 282).

In *Chapin v. Cooke*, *supra*, it is said that a condition in restraint of a second marriage was equally valid by the civil and the common law. It follows that the doctrine of *in terrorem* has no application to such conditions, and that a limitation over is not necessary to their validity. See *Mann v. Jackson*, 84 Me. 400 (30 Am. St. Rep. 358); *Knight v. Mahoney*, 152 Mass. 523 (overruling *Parsons v. Winslow*, 6 Mass. 169).

trine of *in terrorem*. By the common law, a valid condition subsequent must be performed, or it is a ground of forfeiture; and it is immaterial whether there is a limitation over or not. But by the doctrine of *in terrorem*, as applied to bequests of personalty upon condition subsequent in restraint of marriage, though the restraint be partial and reasonable, yet the condition is inoperative, and the legacy already vested remains unaffected by it, unless on the breach of the condition there is a *limitation over to a third person*, or a special direction that the forfeited legacy shall fall into the residuum.¹

¹ EFFECT OF A LIMITATION OVER AS NEGATIVING CONDITION IN TERROREM.—In *Lloyd v. Branton*, 3 Merivale, 108, 117, it is said by Sir William Grant, M. R.: “Different reasons have been assigned by different judges for this operation of a devise [bequest] over. Some have said that it afforded a clear manifestation of the intention of the testator not to make the declaration of forfeiture merely *in terrorem*, which might otherwise have been presumed. Others have said that it was the interest of the devisee [legatee] over which made the difference, and that [thereby] the clause ceased to be merely a clause of forfeiture, and became a conditional limitation, to which the court was bound to give effect. Whatever might be the ground of decision, it was held that where the testator only declared that in case of marriage without consent [for example] the legatee should forfeit what had been before given, but did not say what should become of the legacy, such declaration would remain wholly inoperative.”

As the civil law was applied to legacies, and as by this law all conditions in restraint of marriage were void, the true inquiry is, not why the condition subsequent in partial restraint was void without a limitation over, but why such limitation over rendered valid and enforceable an otherwise void restraint. Perhaps the reason was that the English judges were anxious to escape from the alien doctrine of the civil law, and to enforce the condition, but they hesitated to do so in case of a vested legacy, except in favor of a limitation over.

It is now settled that the doctrine of *in terrorem* does not apply to a condition *precedent*, in partial and reasonable restraint of marriage, attached to a legacy; and unless such condition be performed the legacy (following the common law doctrine) will not vest, although there is no alternative limitation. 2 Pom. Eq.

When there is no limitation over, conditions subsequent in reasonable restraint of marriage are called *in terrorem*, because, in the language of Lord Eldon, in *Clarke v. Parker*, 19 Ves. 1, 13, "they are supposed to alarm persons, when we [*i. e.*, lawyers] know they contain no terror whatsoever." And see *Hogan v. Curtin*, 88 N. Y. 162, 171, where Andrews, J., says of *in terrorem* that it is "merely a convenient phrase adopted by judges to stand in place of a reason for refusing to give effect to a valid condition." The doctrine, however, is well settled. *Coppage v. Alexander*, 2 B. Mon. (Ky.) 313 (38 Am. Dec. 153); *Hotz's Estate*, 38 Pa. St. 422 (80 Am. Dec. 490); *Randall v. Marble*, 69 Me. 310 (31 Am. Rep. 281); *Maddox v. Maddox*, 11 Gratt. 804; *Phillips v. Ferguson*, 85 Va. 509; *Fifield v. Van Wyck*, 94 Va. 557 (64 Am. St. Rep. 745); *Reuff v. Coleman*, 30 W. Va. 171 (3

(2nd ed.), p. 1329, n. 1; 1 Story Eq., § 290; *Phillips v. Ferguson*, 85 Va. 509.

On the other hand, though the condition be subsequent, yet if it is void by the civil and common law alike, as being in total or unreasonable restraint of marriage, the legacy is absolute, and the condition is nugatory, in spite of a limitation over upon its breach. And it is to be noted that the doctrine of *in terrorem* has no application to a grant or devise of real estate (these never having been subject to the civil law), nor even a legacy charged on land. *Scott v. Tyler*, 2 Bro. Ch. 432; 2 Jarm. Wills (891); *Hogan v. Curtin*, 88 N. Y. 162.

But this doctrine of *in terrorem* (condition of a bugbear merely) applies not only to conditions in restraint of marriage, but also to conditions annexed to bequests of personal estate forbidding litigation over a will; but it is admitted in these two classes of cases only. As to them, however, "it must be regarded as settled," as said in *Fifield v. Van Wyck*, 94 Va. 557, 563, "that such conditions are merely *in terrorem* and inoperative when annexed to bequests of personal estate, where there is no gift over on breach of the conditions." See 64 Am. St. Rep. 755, note.

As to what amounts to "a gift over," see note to *Coppage v. Alexander*, 38 Am. Dec. 159; *Maddox v. Maddox*, *supra*; *Phillips v. Ferguson*, *supra*; *Fifield v. Van Wyck*, *supra*; and *Hogan v. Curtin*, *supra*.

S. E. 597); *Bennett v. Packer*, 70 Conn. 357 (39 Atl. 739); *Chapin v. Cooke*, 73 Conn. 72 (84 Am. St. Rep. 189).

§ 269. Summary of the Effect of Conditions in Wills in Restraint of Marriage.

A. CONDITIONS PRECEDENT.

(1) *Real estate.*

(a) Restraint total or unreasonable. The condition is void; but being precedent, the estate also is void and cannot vest either with or without performance.¹

¹ GIFT OF LAND ON CONDITION PRECEDENT IN TOTAL OR UNREASONABLE RESTRAINT OF MARRIAGE.—In 2 Pom. Eq. § 933, it is said: "A condition precedent annexed to a devise of land, even if in complete restraint [of marriage], will, if broken, be operative, and prevent the devise from taking effect." This would imply that if the condition of celibacy be *not* broken, the devisee may, by performance of the condition, acquire the land. And so Judge Story says (1 Eq. Jur., § 289): "If the condition [precedent] regard real estate, and be in general restraint of marriage, there, although it is void, yet, as we have seen, if there is not a compliance with it, the estate will never arise in the devisee." Does this mean that if there *is* a compliance with such condition, then the estate *will* arise and take effect in the devisee?

The above form of stating the law as to the effect of a condition precedent in total or unreasonable restraint of marriage, annexed to a gift of land, is common in the cases, but always as a *dictum*, as no decision has been found in point. It is believed, however, to be erroneous, if it is meant to suggest that the law will permit an estate in land to vest by the performance of such a condition; and that the true doctrine is laid down in Shepard's *Touchstone* (132), where it is said: "In all these cases [*i. e.*, of unlawful conditions, among which the author names "such conditions as are against the liberty of the law, as that a man shall not marry"], if the condition be precedent, *the condition and estate both are void*; for an estate can neither commence nor increase upon an unlawful condition."

And it may be observed that even if public policy allowed an estate in land to vest on the performance of a condition precedent in total restraint of marriage, this condition could not be performed in the devisee's lifetime, and the estate could not vest until after the devisee's death. And then for whose benefit? If

(b) Restraint partial and reasonable. The condition must be performed, or the estate can never vest.

(2) *Personal estate.*

(a) Restraint total or unreasonable. Then the condition only is void, and the gift is good.

(b) Restraint partial and reasonable. The condition is good and must be performed, or the gift cannot take effect.

B. CONDITIONS SUBSEQUENT.

(1) *Real estate.*

(a) Restraint total or unreasonable. The condition is void, and though not performed, the land is not liable to forfeiture.

(b) Restraint partial and reasonable. The condition is good, and if broken the land is liable to forfeiture.¹

a life estate, it would have already expired. If of inheritance, it could only go by descent to collateral relatives of the devisee (who by supposition does not marry), or to those named in his or her will, and the devisee could receive no personal benefit. See an analogous case, *Lewis v. Lewis* (Conn.), 51 Atl. 854.

It is probable that the language which has been criticised above, true as to *valid* conditions precedent in restraint of marriage, was carelessly applied also to such conditions *when not valid*. And no doubt the declaration that as to *land* such unlawful condition, *if broken*, would prevent the estate from vesting, was intended to emphasize the fact that as to *personalty* such condition has not this effect; and, though precedent and unperformed, the legacy takes effect.

As to whether a total or unreasonable restraint of marriage is to be considered as illegal, or not illegal but merely void (see *Harriman on Contracts*, pp. 126-8), it is held in Massachusetts that "contracts which are void at common law, because they are against public policy, like contracts which are prohibited by statute, are illegal as well as void." This was said of a wagering contract; and the law is so laid down in *Bishop v. Palmer*, 146 Mass. 469, as to a contract in unreasonable restraint of trade. The same doctrine seems applicable to a contract in total or unreasonable restraint of marriage; but in *King v. King* (Ohio), 59 N. E. 111, it is held that such contract is not illegal but merely void.

¹ LIMITATION OR CONDITION IN GIFTS DEPENDENT ON MARRIAGE.—

(2) *Personal estate.*

(a) Restraint total or unreasonable. The condition is void, and the gift is absolute.

(b) Restraint partial and reasonable. If there is a gift over, the condition is good, and if broken, the limitation over takes effect. But if there is no gift over, the condition is void,

For full explanation of marriage as a limitation or condition, see § 254, *supra*. It may be added here that a limitation during widowhood, or until marriage, is not considered as in restraint of marriage, and the latter is therefore valid even as to those who have never been married. 2 Min. Ins. 285. And as such was also the rule of the civil law, the doctrine of *in terrorem* has no place, and the estate ends on marriage whether there is a limitation over or not. See cases cited in § 254, *supra*, and also *Hotz's Estate*, 38 Pa. St. 422 (80 Am. Dec. 490, and note); *Arthur v. Cole*, 56 Md. 100 (40 Am. Rep. 409); *Collins v. Burge* (Ky.) 47 S. W. 444; *Vaughan v. Vaughan*, 97 Va. 322.

The reason a limitation of property to a person during widowhood or until marriage is always valid is, as we have seen, because at marriage, the *whole estate given* has been enjoyed, and there is no question of forfeiture; whereas, when the restraint is by way of condition subsequent, a *larger estate limited* is, at marriage, cut short and defeated.

In construing wills, however, courts, while recognizing this distinction, refuse sometimes to give effect to technical words of condition, especially when there is a limitation over; and declaring that the general intent of the will is not to restrain the marriage of the first taker, but to make proper provision for others in that event, sustain the substituted gift as if following a limitation. See *Selden v. Keen*, 27 Gratt. 576; *Mann v. Jackson*, 84 Me. 400 (30 Am. St. Rep. 358); *Jones v. Jones*, 1 Q. B. D., 279; note to *Chapin v. Cooke* (Conn.) 84 Am. St. Rep. 149.

On the other hand, though the words used are strict words of *limitation*, it is argued by Professor Bigelow (2 Jarman Wills (1886), note) that the court should not be bound by the form of words, but that on intention to discourage marriage should be defeated in whatever guise it may appear. "The real question," says Bigelow, "supposing, with the authorities, that an attempt to impose a general restraint of marriage is void, should be whether a purpose to impose such a restraint is apparent from the will. If that purpose is apparent, then on principle it should be immaterial in what form, whether by a simple condition or

being considered *in terrorem* merely, and though broken, the gift is not divested. But this doctrine of *in terrorem* has no application to gifts of real estate, nor to conditions precedent as to personalty, nor to conditions subsequent as to personalty unless in partial and reasonable restraint.

N. B.—By way of exception to the general rule, a condition subsequent in a gift of property to a widow or widower totally restraining a second marriage is good.

§ 270. **Conditions in Restraint of Alienation—Forfeiture by Cesser or by Limitation Over.**—The following summary is taken, by permission, from Gray's *Restraints on Alienation* (2nd ed.), § 279. It will be observed that "condition" refers to a case where on breach of the restraint the land is forfeited *to the grantor or his heirs* on entry, while "conditional limitation" refers to a case where on breach of the restraint the land is to *pass from the first grantee over to a second*. And both of these cases of *forfeiture* for alienation (by way of cesser or limitation over) are to be distinguished from a mere *restraint* on alienation (as to which see § 271, *infra*), where the intent of the grantor is, not that the grantee should *lose* the land on alienation, but that it should *remain the grantee's* (any alienation, voluntary or involuntary, being

by a limitation, the purpose is expressed." And the same view is taken in 2 Pom. Eq. § 933, note. The authorities, however, are *contra*.

In *Jones v. Jones*, *supra*, the court goes so far as to deny that the distinction between limitation and condition extends to devises of land, though admitting its application to personalty. It is believed, however, that the American decisions recognize the distinction as applicable to both realty and personalty, though they are disposed, as has been stated, to construe words of condition as meaning limitation in order to effectuate the general intent. Thus in *Mann v. Jackson*, *supra*, it is said: "And if it is here necessary and proper to recognize and maintain the distinction between a limitation and condition subsequent, the language of this will should be held to constitute a valid limitation, and not an illegal condition."

merely nugatory), in spite of his own wishes or the claims of his creditors.

The cases decided since the publication of the second edition (1895) of Professor Gray's valuable treatise will be found in the notes appended to this section.

FORFEITURE FOR ALIENATION (Gray's *Restraints on Alienation*, § 279).

A. *Fee-simple*.—An *unqualified* [*i. e.*, as to time, persons, &c.] condition or conditional limitation on alienation, *either in general or in any particular mode* [*i. e.*, by deed only or will only], cannot be joined to a fee-simple [in land] or to an absolute interest in personalty. §§ 13-30; 55-56 *g*.¹

¹ CONDITION IN UNQUALIFIED RESTRAINT OF ALIENATION OF A FEE-SIMPLE.—For discussion of the general subject of conditions in restraint of alienation of property see, in addition to Professor Gray's exhaustive monograph, 2 Jarman, Wills (Bigelow's ed.) 855, *et seq.*; note to *Jackson v. Schutz* (N. Y.), 9 Am. Dec. 200; note to *De Peyster v. Michael* (N. Y.) 57 Am. Dec. 488-499; *Mandlebaum v. McDonell*, 29 Mich. 78 (18 Am. Rep. 61).

In *Potter v. Couch*, 141 U. S. 296, 315, it is said: "The right of alienation is an inherent and inseparable quality of an estate in fee-simple. In a devise of land in fee-simple, therefore, a condition against all alienation is void, because repugnant to the estate devised. For the same reason, a limitation over, in case the first devisee shall alien, is equally void, whether the estate be legal or equitable." For the origin of the rule, see *Gray*, §§ 20, 21, 257. His conclusion is (§ 21): "In truth the rule seems not to allow nor call for any reason except public policy."

An unqualified restraint on alienation of a fee-simple cannot be validated by giving to the conveyance the form of *limitation* instead of condition. Thus in *Re Dugdale*, 38 Ch. D. 176 (quoted by *Gray*, § 29 *a*) it is said: "A limitation to A and his heirs, but if he attempts to alien, to B in fee, in an invalid gift over. So also where the limitation is to A and his heirs *until* he attempts to alien, and thereupon to B and his heirs." And see *Metcalfe v. Metcalfe*, 43 Ch. D. 633; *Stansbury v. Hubner*, 73 Md. 228 (25 Am. St. Rep. 584). But see 2 Min. Ins. (4th ed.) 289.

For an example of an unqualified restraint on the alienation of the fee *in a particular mode*, see *Kaufman v. Burgert*, 195 Pa. St. 274 (78 Am. St. Rep. 813). There, after the gift of land in

A condition or conditional limitation on alienation *to certain specified persons* can probably be attached to a fee-simple [in land] or to an absolute interest in personalty; but how far a condition or a conditional limitation on alienation *except to certain specified persons* can be so attached is doubtful. §§ 31-44.¹

fee-simple, the will declared: "Nor shall my said son [the devisee] sell or dispose of any part thereof, but the same shall go [to] and vest in his heirs, unless he shall devise the same by his last will and testament, which he is authorized and empowered hereby to do." The Court said: "It is very clear that the estate devised was an estate in fee-simple, with power to dispose of the same by will but not by deed. In other words, the attempt was made to confer a fee-simple estate shorn of a power to alienate except by will. The authorities are quite clear that in such case the estate in fee-simple passes to the devisee, and the condition against alienation is void."

In this case, the restraint was by way of *restriction merely*; but the law is the same as to the fee-simple when it is by way of condition or conditional limitation. See *Moore v. Saunders*, 15 S. C. 440 (40 Am. Rep. 703), quoted from in § 267, *supra*.

In the above case, the particular mode of alienation forbidden was by deed. But the restraint may be on alienation by will; and this may be imposed by a provision that unless the owner in fee disposes of the property in his lifetime, it shall go over to another, thus, by implication, depriving him of the power to will the property of which he may die seized or possessed. Such a restraint on the power of alienation by will is void. *Gray*, § 56 a; *Case v. Dwire*, 60 Ia. 442 (15 N. W. 265). See *Shaw v. Ford*, 7 Ch. D. 669 (23 Moak, 796).

For other examples of void restraints on alienation of the fee-simple, see *Murray v. Green*, 64 Cal. 363; 28 Pac. 118 (condition that the grantee shall not convey without the consent of the grantor. See also *Winsor v. Mills*, 157 Mass. 362); *Blair v. Muse*, 83 Va. 238 (one of four grantees in fee-simple given, by subsequent clause, power to dispose of the whole); *Ernst v. Shinkle*, 95 Ky. 608; 26 S. W. 813 ("that it shall not be lawful to sell any of my real estate." Decided, however, under the Kentucky statute).

¹ CONDITION AS TO ALIENATION OF THE FEE-SIMPLE QUALIFIED AS TO PERSONS.—As to this qualification, it is said, after a review of

A condition or conditional limitation on alienation of an estate or interest while *contingent* is good; but (except in

the cases, by Gray (§ 41): "The authorities, it will be seen, are in hopeless conflict. The rule which naturally suggests itself is that a condition is good if it allows of alienation to all the world with the exception of selected individuals or classes, but is bad if it allows of alienation only to selected individuals or classes."

It will be seen that the above distinction turns on the *degree* of the restraint as to persons, assuming that *some* restraint is admissible. And it is now probably too late to deny the validity of all restraint as to persons, though this was the view of Chancellor Kent (4 Kent's Com. 131), and of Lord Romilly, in *Ludlow v. Bunbury*, 35 Beav. 36, and though on principle it would seem to be the true doctrine (*Gray*, § 44).

The source of the diverse views as to the extent of the restraint seems to be found in § 361 of Littleton, which is as follows: "But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or [to any] of the issues of such a one, &c., or the like, which conditions do not take away all power of alienation from the feoffee, &c., then such condition is good." On this Coke's comment is: "If a feoffment in fee be made upon condition that the feoffee shall not enfeoff J. S. or any of his heirs and issues, &c., this is good; for it doth not restrain the feoffee from all his power; the reason here yielded by the author is worthy of observation."

Here it will be seen that the reason which Littleton gives, and Coke repeats and emphasizes,—“which conditions do not take away *all* power of alienation from the feoffee”—goes beyond the examples stated,—“not to alien *to such a one*,” &c.,—and embraces conditions not to alien *except* to such a one, &c.; for in both cases it can be said of the condition that, in the language of Coke, “it doth not restrain the feoffee from *all* his power”—*some* liberty of alienation being allowed in the latter case, though to a very limited extent. And according as reliance is placed upon (1) Littleton's examples, or (2) his reason, the test would be (1) the smallness of the restriction, alienation being allowed to *almost* all the world, or (2) the fact that the condition does not take away *all* power of alienation, though almost all the world are excluded.

The diversity of view is well illustrated by four English cases. In *Doe v. Pearson*, 6 East 173, Lord Ellenborough held that a condition, annexed to a devise to a woman in fee, restraining

the Province of Ontario) if a fee-simple or an absolute interest in personalty has *vested*, a condition or conditional limitation against alienation attached to it is void, *however limited in time*. §§ 45-54.¹

alienation "except to her sister or sisters, or their children," was valid—a decision justified by Littleton's reason, as was pointed out by the winning counsel, though going beyond his example. But in *Attwater v. Attwater*, 18 Beav. 330, Lord Romilly refused to follow *Doe v. Pearson*, and held invalid, as to land devised in fee, a direction "never to sell it out of the family; but if sold at all, it must be to one of his [the devisee's] brothers hereafter named"—a decision justified by the example put by Littleton, but falling short of his reason. On the other hand, in *in re Macleay*, L. R., 20 Eq. 186, Sir George Jessel held, following *Doe v. Pearson*, that a devise of land in fee to the testator's brother "on the condition that he never sell it out of the family" was valid. But this again is doubted by Pearson, J., in *in re Rosher*, 26 Ch. D. 801.

In the United States, there are many *dicta* that a condition not to alien to specified persons is good. *Camp v. Cleary*, 76 Va. 140, 143; *Winsor v. Mills*, 157 Mass. 362, 364; *Potter v. Couch*, 141 U. S. 296, 315; *Latimer v. Waddell*, 119 N. C. 370 (26 S. E. 122). And see *Brothers v. McCurdy*, 86 Pa. St. 407 (78 Am. Dec. 388). On the other hand, a condition not to alien *except to specified persons* has been held invalid. See *Schermerhorn v. Negus*, 1 Denio (N. Y.) 448; *Anderson v. Cary*, 36 Ohio St. 506 (38 Am. Rep. 602); Gray, §§ 40, 43, and cases cited.

In *Rice v. Hall* (Ky.) 42 S. W. 99, it is held that a condition in a deed of gift that the grantee in fee shall sell the land to a certain person at a certain price is valid. Of course a trust of this character would be valid; but if the grantee has once taken beneficially, it would seem that such a condition subsequent is void, not only as confining alienation to a single person, but also as compelling the grantee to alienate, when he might prefer not to do so. But see 1 Shepp. Touch. 129 (Preston's interpolation), which, however, is not sustained by Littleton § 361, which is cited as authority.

¹ CONDITION IN RESTRAINT OF ALIENATION OF A VESTED FEE-SIMPLE FOR A CERTAIN TIME.—As to a vested fee-simple, the statement in the text is supported by all the recent authorities, following the leading case of *Mandlebaum v. McDonell*, 29 Mich. 78 (18 Am. Rep. 61), where it was held that "there has never been a time

A condition or conditional limitation attached to a fee-simple [in land] or an absolute interest in personalty to take

since the statute of *Quia Emptores* when a restriction in a conveyance of a vested estate in fee-simple, in possession or remainder, against selling for a particular period of time was valid by the common law"; and that "a condition or restriction which would suspend all power of alienation for a single day is inconsistent with the estate granted, unreasonable, and void." See *Potter v. Couch*, 141 U. S. 296, 315; *Anderson v. Cary*, 36 Ohio St. 506 (38 Am. Rep. 602); *Murray v. Green*, 64 Cal. 363 (28 Pac. 118); *Latimer v. Waddell*, 119 N. C. 370 (26 S. E. 122); *Zillmer v. Landguth*, 94 Wis. 607 (69 N. W. 568); *Jones v. Port Huron, &c., Co.*, 171 Ill. 502 (49 N. E. 700); *in re Rosher*, 26 Ch. D. 801.

As to *contingent* fees, the leading decision sustaining a time-restraint on their alienation is *Large's Case*, 2 Leon. 82 (3 Id. 182); and this case has sometimes been cited as if it were authority for such restraint on a vested fee-simple. But that the fee-simple in *Large's* case was contingent was demonstrated by *Christiancy, J.*, in *Mandlebaum v. McDonell*, *supra* (and see *Murray v. Green*, *supra*); and it is conceded that the reasons of policy which forbid a time-restraint on a vested fee do not apply to a fee while it remains contingent. See *Gray*, § 46; *Mandlebaum v. McDonell*, *supra*.

In *Fowlkes v. Wagoner* (Tenn. Ch. App), 46 S. W. 586 (affirmed orally by the Supreme Court), a distinction is made between time-restraints, attached to a vested fee-simple, according as they are imposed by way of *restriction merely* (as was the case at bar), or by way of condition or conditional limitation; and while deciding that such restriction ("I further direct that he shall not sell or dispose of said land until after he arrives at the age of twenty-five years") was void because of the absence of a clause of cesser or limitation over, it was declared that the presence of such clause would have rendered the restraint valid. And of *Large's Case*, even though "misapplied by text-writers and by judges," it was said, "The construction given to it heretofore has become a rule of property."

It is believed, however, that the suggested distinction between a mere restriction on the one hand and a restraint involving forfeiture on the other is unsound; and as to *Large's Case* its supposed application to vested estates in fee-simple is now repudiated in England as well as in the United States. See 2 Jarm. Wills (Bigelow's ed.), 860-61; *in re Rosher*, *supra*; American cases cited, *supra*.

effect if the owner does not alienate, *e. g.*, if he dies intestate without having disposed of the estate, is, though without sufficient reason, held void. §§ 57-74 *g.*¹

¹ CONDITIONS IN RESTRAINT OF DESCENT OF LAND OF WHICH THE OWNER DIES INTESTATE.—When land is devised to A in fee, with full power to dispose of it by deed or by will, but on condition that, if undisposed of, it shall go over to B, the condition is void. Such a condition, however, cannot be said to restrain alienation; its effect, if valid, would be to *induce* alienation, in order that the devisee, or some one claiming under him, may get the benefit of the property. The restraint is really on the *descent* of the land to the devisee's heirs; and by it the devisee is not permitted "to let the law make his will for him," but he must make his own will, or else the property of which he dies seised or possessed is to pass to the executory devisee. Why, then, is such a condition void and the gift over invalid?

The reasons that have been given for this doctrine are (see *Gray*, § 74 c): (1) that the gift over is repugnant; (2) that the descent of a fee-simple to the owner's heirs on his death intestate is a necessary incident of the estate; and (3) that an executory devise contingent on an event whose happening the first taker may prevent is void.

As to the first reason, there is clearly no repugnancy, though as to personal property the uncertainty of the gift over might be a ground for annulling it. (But see § 244, *supra*, where both repugnancy and uncertainty are given as the reasons for the doctrine of *May v. Joynes*, similar to that now under discussion.)

As to the second reason, see *Shaw v. Ford*, 7 Ch. D. 669 (23 Moak 796) where it is said by Fry, J.: "Any executory devise which is to defeat an estate, and which is to take effect on the exercise of any of the rights incident to that estate is void. . . . A very familiar illustration is this, that an executory devise to take effect on alienation, or an attempt at alienation, is void. . . . Another illustration of the same principle is that which arises when the executory devise over is made to take effect *on not alienating*, because the right to enjoy without alienation is incident to the estate given." But this does not tell us *why* the right to enjoy [and transmit to heirs] should be so incident to a fee-simple as not to come within the maxim *modus et conventio vincunt legem*. It simply announces the fact.

As to the third reason—that a devise depending on a contin-

B. *Fee-Tail*.—A condition or conditional limitation on alienation attached to an estate in fee-tail is good, but is destroyed by barring the estate; and the barring of an estate tail cannot be restrained by any condition or conditional limitation. §§ 75-77

C. *Estate for Life*.—A condition or conditional limitation on alienation is good when attached to a life estate or interest in either realty or personalty. §§ 78-96.¹

gency within the control of the first devisee is void—there is no such rule of law. See *Gray*, § 63.

It would seem, then, that the well-established doctrine that a condition in restraint of the descent of land of which the owner dies intestate is void must be regarded as a rule based on a supposed public policy, having regard to the possible defeat of the owner's intention in favor of his heirs by an accidental intestacy, or the hazard to his creditors. See *Watkins v. Williams*, 3 McN. & G. 622; *Gray*, §§ 57, 74 *g*. And as to personal property, there is an additional objection in the difficulty of identifying an undisposed of residue as the subject-matter of the gift, after the lapse, perhaps, of many years.

In *Lockridge v. McCommon*, 90 Texas 234 (38 S. W. 33) it is held that a provision in a deed conveying land in fee-simple that, in case of the grantee's death without having disposed of the land by deed or will, *and without issue or their descendants living at the time of his death*, the title should pass to others, is valid as a conditional limitation. The court declared that the condition "without having disposed of his share or part of said land by deed or by will" was not repugnant, but added: "If, however, it be granted that the former condition was repugnant to the estate vested in [the first devisee], then the repugnant condition would be invalid, and the instrument would be construed as if it had not been inserted. That condition being eliminated, the deed would vest the title in the [first devisee], limited upon the contingency of failure of issue and their descendants [living at his death], on the happening of which the title would vest in the plaintiff [the executory devisee]." But see *Combs v. Combs*, 67 Md. 11 (8 Atl. 757).

¹ CONDITIONS IN RESTRAINT OF ALIENATION OF LIFE ESTATE.—"Freedom of alienation is not one of the incidents of an estate for life or for years, nor could it be without sometimes endangering the interest of him in reversion or remainder." 2 Min. Ins.

Exception.—If the life-tenant is the settlor, a condition or conditional limitation is bad on involuntary alienation; how far it is good on voluntary alienation is doubtful. §§ 90–100.

D. Estate for Years.—A condition or conditional limitation on alienation attached to an estate for years is good. §§ 101–103.

(4th ed.) 290. See, in accord, *Rochford v. Hackman*, 9 Hare 475; *Nichols v. Eaton*, 91 U. S. 716; *Camp v. Cleary*, 76 Va. 140; *Bull v. Kentucky, &c., Bank*, 90 Ky. 452 (14 S. W. 425); *Jackson v. Harrison*, 17 Johns (N. Y.) 66. See also *Henderson v. Harness*, 176 Ill. 302 (52 N. E. 68).

The rule is the same whether the estate for life is legal or equitable, and whether the estate is to cease on breach of the condition (cesser and reversion) or go over to a third person. And the life estate may be made to cease or go over on either voluntary or involuntary alienation. *Rochford v. Hackman, supra*; *Brandon v. Robinson*, 18 Vesey, 429; *Gray*, §§ 79, 80.

In *Camp v. Cleary*, 76 Va. 140, A, by the same deed, granted three lots to B,—the first two to B in fee-simple, and the third, on which there was a mausoleum, to B for life; on condition that if B should ever alienate or dispose of the mausoleum lot in any way, the deed should cease and be void as to all three lots, which thereupon should go over to a third person. It was held that this was a valid condition, and that on breach of it by the sale of part of the mausoleum lot, the conditional limitation in favor of the third person took effect as to all three lots. The reasoning of the court is not clear, and is criticised by Professor Gray (*Restraints on Alienation*, §§ 29 a, 29 b).

It would seem, however, that the result reached in *Camp v. Cleary* is right on the facts. The restraint on alienation was imposed on the mausoleum lot only, and that lot was conveyed for life, and not in fee; and as an unlimited restraint on the alienation of a life estate is valid, no reason is perceived why, on its breach, all three lots should not be forfeited. No restraint is imposed on the alienation of the lots granted in fee. An estate in fee-simple can be granted on a condition subsequent, whether collateral to or connected with the estate granted; and this condition, if valid, as it was in *Camp v. Cleary*, will on its breach cause the fee-simple to be divested, and shift to an executory grantee.

§ 271. **Restraint on Alienation without Condition or Conditional Limitation.**—As explained in § 270, *supra*, the grantor of land may declare that it shall be tied up in the hands of the grantee, though there is to be no forfeiture for alienation either to the grantor (condition), or to a third person (conditional limitation)—the purpose being, as stated by Gray, not to *punish* but to *prevent* alienation. The following summary of the law as to such mere restraint is taken, by permission, from Gray's *Restraints on Alienation* (2nd ed., 1895), § 279.

RESTRAINT ON ALIENATION (Gray, § 279).

A. *Fee-simple*.—Any provision restraining the alienation, voluntary or involuntary, of an estate in fee-simple [in land] or an absolute interest in chattels, real or personal, whether legal or equitable, is void. §§ 105–124.¹

Exception 1. In Pennsylvania the law is doubtful. §§ 124 a.–124 k.

¹ RESTRAINT ON ALIENATION OF THE FEE-SIMPLE IN LAND.—In the great case of *Mandlebaum v. McDonell*, 29 Mich. 78 (18 Am. Rep. 61), the will provided that certain real estate should remain unsold until one of the devisees should be twenty-five years of age; or, in case of his death, until twenty-one years from the date of the will. This was construed to be a mere restraint on alienation, the court saying: "Not even the violation by them of the provisions restricting their power of sale was to defeat or affect their interest, forfeit it to the heirs, or pass it over to others; but all conveyances of that kind, it is declared, shall be void. . . . The devise is not made upon the condition that it shall be forfeited on a sale, or an attempted sale, and that the interest of the devisees shall terminate, or go to the heirs, nor is it limited over to any other person on the breach of the restriction upon the power of sale; but the devise and the interest intended to pass by it were to be absolute and unconditional in this respect, whether the restriction should be observed or violated."

The restriction was held void, the court declaring, after an exhaustive examination of the authorities: "We are entirely satisfied that there has never been a time since the statute *Quia Emptores* when a restriction in a conveyance of a vested estate in fee-simple, in possession or remainder, against selling for a particular period of time, was valid by the common law."

Exception 2. In Massachusetts a provision that the absolute present owner of property shall not receive it till reaching a certain age is valid. §§ 124 *l.*—124 *p.*

Exception 3. Married women may be restrained from the voluntary or involuntary alienation of their separate estates. §§ 125—131 *k.*

B. Fee-tail.—Any provision restraining the alienation of an estate tail is destroyed by the barring of the estate. § 132.

Exception. If an equitable fee-tail, being the separate estate of a married woman, is subject to a provision against alienation, the fee-simple which arises on barring the estate tail is subject to a like provision. § 133.

C. Estate for Life.—Any provision restraining the alienation, voluntary or involuntary, of a life estate or interest, in realty or personalty, whether legal or equitable, is void. §§ 134—213; 263—268 *b.*¹

¹ SPENDTHRIFT TRUSTS—RESTRAINT ON ALIENATION OF AN EQUITABLE LIFE ESTATE.—As stated by Professor Gray, under the *Exception* which follows, it is now held in a number of the States that an equitable life interest, when the life tenant is not the settlor, may be subjected to a provision against alienation. Such provisions are known as “spendthrift trusts,” which may be shortly defined as trusts creating inalienable equitable life interests. They are denounced by Gray, and with good reason, as contrary to public policy. As is said in *Tillinghast v. Bradford*, 5 R. I. 205: “No man should have an estate to live on, but not an estate to pay his debts with. Certainly property available for the purposes of pleasure or profit should also be amenable to the demands of justice.”

It should be borne in mind that there is no objection in law to a restraint on alienation of a mere life estate, whether legal or equitable, if it be by way of condition or conditional limitation, involving on breach forfeiture, either by cesser in favor of the grantor, or by limitation over to a third person. For the effect of forfeiture, whether the one way or the other, is to deprive the grantee of the life estate; and this is an entirely different matter from a provision, “that a life tenant shall not alienate or anticipate,—that is a provision, not that he and his assigns shall lose the estate on alienation, but that he shall be compelled to keep it, so that neither his grantees, nor his creditors, nor any third per-

Exception 1. In Pennsylvania and Massachusetts an equitable life interest, when the life tenant is not the settlor, may be subjected to a provision against alienation. §§ 214-240 *g.*

son, can get hold of it or enjoy it." *Gray*, § 134. It is this latter provision which some courts hold void whether the estate for life be legal or equitable, but which others sustain when the estate is equitable, though not when it is legal—thus recognizing the spendthrift trust. *Henderson v. Harness*, 176 Ill. 302 (52 N. E. 68).

It will be seen, therefore, that the doctrine of spendthrift trusts is not needed to sustain a restraint on the alienation of a life estate when enforced by way of forfeiture,—this all courts regard as valid; nor is the doctrine, when recognized, potent enough to validate mere restraints, without forfeiture, on the fee-simple, legal or equitable, or on legal life estates [see, however, as to *equitable fees*, end of this note]. The conflict of authority has been as to the validity of a restraint on alienation, without forfeiture for its breach, of an *equitable estate for life*—the true description, as we have seen, of a spendthrift trust.

The form of such a trust may be illustrated by two cases, one the leading decision in Massachusetts, and the other a recent case in Pennsylvania, "the mother of spendthrift trusts."

In *Broadway Bank v. Adams*, 133 Mass. 170, the language of the will was as follows: "I give the sum of \$75,000 to my said executors, and the survivors or survivor of them, in trust to invest the same in such manner as to them may seem prudent, and to pay the net income thereof, semi-annually, to my said brother Charles W. Adams, during his natural life, such payments to be made to him personally, when convenient, otherwise upon his order or receipt in writing; in either case free from the interference or control of his creditors, my intention being that the use of said income shall not be anticipated by assignment."

Upon a bill in equity to reach and apply the income of this trust fund to the payment of a debt due by the *cestui que trust*, Adams, to the Broadway Bank, it was held that the trust was valid, although there was no provision for cesser or limitation over, and that the income could not be subjected by creditors in advance of its payment to the beneficiary. The court said: "The rule of public policy which subjects a debtor's property to the payment of his debts does not subject the property of a donor to the debts of his beneficiary, and does not give the creditor a right to complain that in the exercise of his absolute right of

So now [2nd edition] also in Illinois, Maine, Maryland, Mississippi, Vermont, Missouri, and Tennessee; and probably also in Delaware, Indiana, and Virginia. §§ 240 *h*–249 *b*. In the Federal Courts the authorities are conflicting. §§ 250–268 *a*.¹ [But see as to Virginia, note 1, *infra*.]

disposition, the donor has not seen fit to give the property to the creditor, but has left it out of his reach.”

In *Winthrop Company v. Clinton*, 196 Pa. St. 472 (79 Am. St. Rep. 729), the will created a trust in the executors, as to the residue of the testator's estate, to pay the net income thereof to his son, “for his use and support for and during the term of his natural life, and not to be liable to anticipation, and his receipt alone to be the sole discharge to my said trustees.”

On an attempt of a creditor of the son to attach the income of the fund in the hands of the executors, it was held that the language above was sufficient to create a spendthrift trust free from the claims of creditors, and that it was not necessary that the will should declare specifically that the income should not be subject to the debts or liabilities of the *cestui que trust*. The court said: “It would be utterly impossible to furnish continuing support for the whole life of a *cestui que trust* out of an annual income fund, if that fund is to be held subject to the claims of creditors who may at any time take it from him by means of adversary proceedings. It is therefore a necessary inference that the testator had no such intent in this case, and hence it follows that his purpose was to establish a spendthrift trust in favor of his son.”

In the definition of a spendthrift trust above, the doctrine was confined to equitable life estates, and such had been considered the settled law in the States recognizing spendthrift trusts, with a doubt as to the law in Pennsylvania. See *Gray*, § 124 *a*, *et seq*. But in a valuable discussion of such trusts in 54 *Central Law Journal*, p. 382, by Nathaniel S. Brown, the writer, while favoring the policy of spendthrift trusts for life, regrets that some of the later decisions seem to have extended the doctrine of these trusts to equitable fees,—“an extreme view, which may become productive of harm.” He cites *Claflin v. Claflin*, 149 Mass. 19; *Barker's Estate*, 159 Pa. St. 518; *Goe's Estate*, 146 Pa. St. 431; *Beck's Estate*, 133 Pa. St. 51; *Rhoads v. Rhoads*, 43 Ill. 239; *Weller v. Noffsinger*, 57 Neb. 455 (77 N. W. 1075). And see *Board of Charities v. Lockard*, 198 Pa. St. 572 (82 Am. St. Rep. 817).

¹ SPENDTHRIFT TRUSTS IN THE UNITED STATES.—The above summary by Professor Gray does not give statutory changes, and some

Exception 2. Married women may be restrained from the alienation, voluntary or involuntary of their separate life estates or interests; but in Pennsylvania and Massachusetts women, married or single, cannot so settle *their own property* as to preserve it from creditors during coverture. §§ 269-277 *a*.

additional decisions have been made since the publication of his second edition (in 1895) of *Restraints on Alienation*. As the result of these decisions, Texas and Nebraska sanction spendthrift trusts, and Virginia repudiates them. See *Wood v. McClelland* (Texas), 53 S. W. 381; *Weller v. Noffsinger*, 57 Neb. 455 (77 N. W. 1075); *Hutchinson v. Maxwell* (Va.), 40 S. E. 655 (7 Va. Law Reg. 785).

Both the Texas and Nebraska courts approve the *dictum* of Mr. Justice Miller in favor of spendthrift trusts in *Nichols v. Eaton*, 91 U. S. 716; and the Nebraska court quotes at length the well-known argument of that learned judge. This argument is no doubt largely responsible for the rapid growth of spendthrift trusts in the United States during the last twenty-five years, the seed sown falling on fertile soil in the social and economic condition of the country.

In Virginia there had been *dicta* in favor of spendthrift trusts, but in the recent case of *Hutchinson v. Maxwell*, *supra*, (decided in 1902), these *dicta* are repudiated, and the view of Professor Gray is adopted that such trusts are void on the ground of public policy. In this case, a wife made conveyances of property to a trustee in order, as was stated, to provide "an estate and fund for the maintenance, support, and enjoyment of the said Clark Maxwell, the husband of the said party of the first part, at the same time securing the same against his improvidence, without being alienable by him, or in any wise subject to, or chargeable with, his past, present, or future debts or liabilities.

The court held, as one ground of decision, that such a trust was void as to creditors under a Virginia statute which went into effect January 1, 1787 (now § 2428 of the Code), declaring that, "Estates of every kind, holden or possessed in trust, shall be subject to debts and charges of the persons to whose use or to whose benefit they are holden or possessed, as they would be if those persons owned the like interest in the things holden or possessed as in the uses or trusts thereof." And see the same construction given to a similar statute in Kentucky, as forbidding spendthrift trusts, in *Haycraft v. Bland*, 90 Ky. 400 (14 S. W. 423; 9 L. R. A. 599), citing

D. Estate for Years.—Any provision restraining the alienation of an estate for years is void, *semble*. § 278.

earlier cases, among them *Marshall v. Rash*, 87 Ky. 116 (12 Am. St. Rep. 467). But see *contra* as to the effect of a similar statute, *Leigh v. Harrison*, 69 Miss. 923 (18 L. R. A. 49).

But in *Hutchinson v. Maxwell*, the court did not place the decision solely on the statute, but as has been stated above, declared, following the English doctrine, that spendthrift trusts are void because against public policy. The court said, *per Buchanan, J.*):

"The decisions of the American courts on this question are conflicting, and the reasoning of the cases which uphold spendthrift trusts is unsatisfactory, and, as it seems to us, at war with well-settled principles of law as to the incidents of property; whilst the English courts of chancery and the American cases which follow them (even if our statute did not make a debtor's equitable property liable for his debts to the same extent as if he were the legal owner) seem to us to be sustained by the better reason, and in furtherance of a wise public policy. Whatever rights, whether legal or equitable, a person *sui juris* has in property, ought to be, and we think are, liable for his debts, except so far as exempt therefrom by statute. Whatever rights of property the *cestui que trust* can demand from his trustees, his creditors ought to have the right to subject to the payment of his debts, unless his rights are so connected or blended with the rights of others that they cannot be subjected without prejudice to the latter's rights. *Nickell v. Handly*, 10 Gratt. 336, 339. . . . The effect of upholding spendthrift trusts would be to encourage idleness and lessen enterprise, and to foster a class who become more and more reckless and indifferent to their honest debts from a sense that they are hedged in by the law beyond the reach of their creditors."

In the article in the *Central Law Journal*, May 16, 1902 (already referred to), the American States are thus classified:—

I. *States adhering to the English doctrine* (*i. e.*, repudiating spendthrift trusts): Rhode Island, North Carolina, South Carolina, Georgia, Alabama, and Ohio. [To this list Virginia should now be added. See *Hutchinson v. Maxwell, supra*.]

II. *States where only dicta are found*: Wisconsin, Indiana, Delaware, and Connecticut. [As to Wisconsin, see *In re Luscombe's Will*, 109 Wis. 186 (85 N. W. 341).]

III. *States where the question is regulated by statute*: New York, New Jersey, Tennessee, and Kentucky. [In the first three States named, spendthrift trusts are *validated* by statute. As to Tennessee, see *Jourolman v. Massengill*, 86 Tenn. 81 (5 S. W. 719);

Exception. Married women can be restrained from the alienation, voluntary or involuntary, of estates for years which are their separate property. § 278 *a*.

§ 272. **Condition Subsequent—How Created.**—A condition subsequent, in order that its breach may operate to defeat the estate granted, must be expressed in the deed itself, or arise by necessary implication from its terms. 2 Wash. Real Prop. (4th ed.), 7; note to *Cross v. Carson* (Ind.), 44 Am. Dec. 744. Extrinsic evidence of such a condition is inadmissible. Its reception would violate the rule which forbids parol contemporaneous evidence to contradict or vary the terms of a valid written instrument. Greenl. on Evid. (16th ed.), § 275; and § 305 *c*, by Wigmore.

As stated in 2 Devlin on Deeds, (2d ed.), § 976: "In an action to recover property conveyed by a deed on the ground

First Nat. Bank v. Nashville Trust Co., 62 S. W. 392. In Kentucky, as we have seen, and also in Virginia, they are *void by statute*.]

IV. *States upholding spendthrift trusts:* Pennsylvania, Massachusetts, Illinois, Maine, Mississippi, Maryland, Texas, Nebraska, Vermont, Virginia and Missouri. [But as to Virginia see *Hutchinson v. Maxwell*, *supra*, placing Virginia under Classes (I.) and (III.) above.]

As to the law of Maryland, see the able dissenting opinion of Chief Justice Alvey in *Smith v. Towers*, 69 Md. 77 (15 Atl. 92; 9 Am. St. Rep. 404). Of *Smith v. Towers*, it is said by Professor Gray (*Restraints on Alienation*, 2d ed., § 240 *l*): "The opinion of the Court, and especially the dissenting opinion of the Chief Justice, are by far the best discussions of the question to be found in the recent cases."

As to spendthrift trusts in West Virginia, see *McClure v. Cook*, 39 W. Va. 579 (20 S. E. 612), where it seems to be assumed, *obiter*, that such a trust would be unlawful; but see now *Guernsey v. Lazear*, 41 S. E. 405, upholding spendthrift trusts.

For the distinction on the facts between *Nichols v. Eaton*, *supra*, where it was not *obligatory* on the trustee to devote any part of the income to the support of the beneficiary, and *Hutchinson v. Maxwell*, *supra*, when the trustee's discretion was only as to the amount needed for the beneficiary's maintenance, see 7 Va. Law Reg. 798, note.

that a condition on which it was made has not been performed, the deed must speak for itself, and a condition cannot be grafted upon a deed absolute in form by parol evidence. The ingrafting of a contemporaneous condition on a deed will, in a proper action, be allowed only on clear evidence of fraud, accident, or mistake." See *Gadberry v. Sheppard*, 27 Miss. 203; *Rogers v. Sebastian*, 21 Ark. 440; *Thompson v. Thompson*, 9 Ind. 323 (68 Am. Dec. 638); *Long v. McConnell*, 158 Pa. St. 573 (28 Atl. 233).

As an exception to the general rule above stated, it is the doctrine of equity that a deed absolute on its face may be shown by extrinsic evidence to be in reality a mortgage. 3 Pom. Eq. (2d ed.) § 1196. And though a deed of conveyance is silent as to a condition, this may be annexed thereto if contained in a bond or other written agreement, executed at the same time as the deed, and as a part of the same transaction. *Richter v. Richter*, 111 Ind. 456 (12 N. E. 698); *Downing v. Rademacher*, 133 Cal. 220 (85 Am. St. Rep. 160); *Miller v. Quick*, 158 Mo. 495 (59 S. W. 955).

§ 273. **Condition Subsequent—Who is Liable to Forfeit for its Breach.**—A condition subsequent enters into and qualifies the estate granted, and renders it defeasible not only in the hands of the original grantee or devisee, but in whose-soever hands it may come, by purchase or by descent. Hence it is binding on the heir or devisee of the receiver on condition, and also on his alienees. As is said in *Sheppard's Touchstone* (120): "And if he that hath the estate [on condition subsequent] grant or charge it, it will be subject to the condition still; for the condition doth always attend and wait upon the estate or thing whereunto it is annexed, so that although the same do pass through the hands of an hundred men, yet it is subject to the condition still; and although some of them be persons privileged in divers cases, as the king, infants, and women covert, yet they also are bound by the condition." See 44 Am. Dec. 745, note; *Jackson v. Topping*, 1 Wend. (N. Y.), 388 (19 Am. Dec. 515); *Ver-*

planck v. Wright, 23 Wend. 506; *Hogeboom v. Hall*, 24 Wend. 146; *Taylor v. Sutton*, 15 Ga. 103 (60 Am. Dec. 682); *Sioux City, &c., R. Co. v. Singer*, 49 Minn. 301 (32 Am. St. Rep. 554); *Ruddick v. St. Louis, &c. R. Co.* 116 Mo. 25 (38 Am. St. Rep. 570.)¹

In 2 Devlin on Deeds (2d ed.), § 970, it is said: "To bind the heirs or assigns to the performance of a condition subsequent, the condition must expressly mention them." But it is believed that this is not true as a general proposition, and that it is always a question of construction whether the condition was meant to concern the *grantee* alone, or to affect the *estate* in the land itself. In the latter case, the grantee's heir or assignee is bound, although not named in the deed. In the former, the death of the grantee, or his alienation, discharges the condition, and the heir or alienee takes the estate free from condition. Thus a condition in a lease that certain land "shall not be cleared, nor any timber cut therefrom," not saying by whom, is a condition attached to and operating upon the estate, and not merely personal, and passes with the estate to an assignee, though he be not named. *Verplanck v.*

¹ WHO LIABLE TO FORFEIT FOR BREACH OF CONDITION SUBSEQUENT.—In Tucker's Commentaries, Book 2, p. (92), the law is thus laid down: "The heir of the feoffee or his assignee are equally bound to perform the condition for the preservation of the estate when it is of a nature to be performed by them. For as they have received the estate they must *ex necessitate* take it subject to the restraints, terms, and modifications attached to it by the original grant or contract of the parties. It is upon a like principle that even *femmes covert* and infants are bound by conditions, though they cannot make a valid contract; for they are bound not by virtue of *their agreement*, but upon the obvious principle that if I take *under* a gift or contract I must take *according to it*, or not at all. I cannot garble it, taking what I like, and rejecting what does not suit me. Thus, too, it is that an assignee is bound by a condition whether it respect a thing which is parcel of the demise or not. Whereas a *covenant* which does not affect a thing parcel of the demise does not bind the assignee, but is considered as in gross, or collateral." See *Hickey v. Lake Shore, &c., R. Co.*, 51 Ohio St. 40 (46 Am. St. Rep. 545).

Wright, 23 Wend. 506. But this condition in a deed, "if the said George Simpson [the grantee] shall neglect to keep up at his own expense, forever, a good and lawful fence," etc., is personal, and binds George Simpson alone. *Emerson v. Simpson*, 43 N. H. 475 (82 Am. Dec. 168.) And see 44 Am. Dec. 745, note; 2 Washburn, Real Prop. (5th ed.), p. 447.

In *Odessa Improvement, &c., Co. v. Dawson*, 5 Texas Civ. App. 487 (24 S. W. 576), it was held that a condition in a deed prohibiting the use of land for the manufacture or sale of intoxicating liquors is binding into whosoever hands the land may thereafter come; and that the grantor may enforce a forfeiture for the reach of the condition against a purchaser from the grantee, though the condition did not in express terms purport to bind the heirs and assigns of the grantee. The court said: "That the law applies the rule of strict construction when forfeiture is claimed for the breach of a condition subsequent, there can be no question. And upon this ground it has been very generally laid down by text writers that 'where a condition applies in terms to the grantee, without mentioning assigns, they will not be included.' To sustain this view, the cases of *Emerson v. Simpson*, 43 N. H. 475, and *Page v. Palmer*, 48 N. H. 385, are invariably cited. These cases are no doubt authority for the proposition that where the deed in terms exacts the doing of something by the grantee by name, and does not make the same requirement of his heirs or assigns, a forfeiture will not be decreed for their failure; and hence it will be noted that the text writers in stating the principle, apply it to cases where the 'condition in terms applies to the grantee.' In this case it will be noted that the condition in the deed does not in terms apply to the grantee in stating the prohibition, but applies to the lot itself. The language is, 'the property hereinafter described shall not be used,' etc. And see *Sioux City, &c., R. Co. v. Singer*, 49 Minn. 301 (32 Am. St. Rep. 554); *Upington v. Corrigan*, 151 N. Y. 143, 154 (37 L. R. A. 794.)

§ 274. **Condition Subsequent—Who May Perform.**—It is manifest that any one who is liable to forfeit the land for non-performance of a condition subsequent (see § 273, *ante*) is entitled to perform the condition, and thus avoid the forfeiture. Hence any one may perform the condition into whose hands the land has come subject thereto, whether he be the grantee's heir, devisee, or alienee. But this is not all; for the rule is laid down that every person who has an interest *in the condition*, or in the land to which it relates, may perform it. How then can one be interested in the condition (and so be entitled to perform it) though he is not interested in the land to which it relates?

In 2 Tho. Co. (44), the case is put of a conveyance of land on condition subsequent that the feoffee pay to the feoffor a sum of money by a day named, but before the day named the feoffee sells the land to another; and it is declared that either the first or the second feoffee may perform the condition by the payment of the money. The reason for this is thus stated by Coke: "Albeit the second feoffee be not named in the condition, yet shall he tender the sum, because he is privy in estate, and in judgment of law hath an estate and interest in the condition (as Littleton here saith) for the salvation of his tenancy. And note that he hath an interest in the condition on one side, or in the land on the other, may tender. . . . The first feoffee may, notwithstanding his feoffment, pay the money to the feoffor, because he is party and privy to the condition, and by his tender may save the estate of his feoffee, which in all good dealing he ought to do." 2 Wash. Real Prop. (5th ed.), 450; 2 Min. Ins. (4th ed.), 278; 44 Am. Dec. 745, note; *Marks v. Marks*, 10 Mod. 419; *Simonds v. Simonds*, 3 Mete. (Mass.), 558; *Wilson v. Wilson*, 38 Me. 18 (61 Am. Dec. 227); *Louisville, &c., R. Co. v. Covington*, 2 Bush (Ky.), 526.

As to the performance of a condition by the *heir* of the feoffor, as by payment of a sum of money whereby to divest the estate conveyed to the feoffee on condition of such pay-

ment by the *feoffor* (not naming his heir) there is a diversity according as the time of payment is or is not fixed. When the time is fixed, the heir of the feoffor may pay the money; when no time is fixed, the heir cannot pay. See 2 Tho. Co. (45), where it is said by Littleton: "For when the condition is that if the feoffor pay the money to the feoffee, etc., [no time being named] this is as much as to say, if the feoffor during his life pay the money to the feoffee, etc., and when the feoffor dieth, then the time of the tender is past. But otherwise it is where a day of payment is limited, and the feoffor die before the day, then may the heir tender the money, as is aforesaid; for that the time of the tender was not past by the death of the feoffor."

But it is manifest that the denial of right of performance to the feoffor's heir when no time of payment is agreed on by the parties is not on account of any exclusion of the heir as such, but because the law in this case limits the *time* of performance, viz., to the life-time of the feoffor. In the words of Judge Tucker (2 Comm. 93): "Unless the contract be interpreted to require payment during the feoffor's life, it would be utterly indefinite when payment should be made, as no time is specified."¹

¹ TIME OF PERFORMANCE OF CONDITIONS SUBSEQUENT.—He who imposes a condition has a right to limit the time within which it may be performed, and if he does so, the time specified must be observed. 2 Min. Ins. (293); *Wheeler v. Walker*, 2 Conn. 196 (7 Am. Dec. 264); *Thompson v. Lyon*, 40 W. Va. 87 (20 S. E. 812). But when no time is specified, then the law prescribes a reasonable time for performance; and what is reasonable depends on the circumstances of each case.

Thus the time of performance may endure for the grantor's life-time, as where he has conveyed the land with a right of reëntury on his payment to the grantee of a certain sum of money, no time being specified; for here in the meantime the grantee has the enjoyment of the land, and is not injured by the delay. But if the condition be that the grantor shall re-enter unless the grantee pay the grantor a certain sum of money, here the grantee must pay the grantor in a reasonable time; for meanwhile the grantee has the

§ 275. Breach of Condition Subsequent—Who May Enforce Forfeiture Therefor.—“It is of the essence of an estate on condition that the right to enter for breach of the condition be reserved to the grantor and his heirs. It cannot be reserved to strangers.” *Per* Bigelow, J., in *Guild v. Richards*, 16 Gray (Mass.), 308, 317. And further it is the doctrine of the common law that a forfeiture for a breach of the condition can only be *enforced* by the grantor or his heirs. It cannot be enforced by the grantor’s assignee or devisee. “All that remains in the grantor of an estate [in fee] on condition is a right of entry for breach, which is sometimes called a possibility of reverter. This right or possibility, although it may be released to the person holding the conditional estate, so as to vest the absolute title in him, cannot be conveyed to a stranger or third person. A mere right of entry could not be conveyed at common law. It would be contrary to the ancient, well-settled rule that ‘nothing in action, entry, or re-entry can be granted over.’ Co. Litt. 214 a.” *Guild v. Richards*, *supra*, p. 317. See also § 212, *supra*.¹

enjoyment of the land, and the grantor has neither land nor money. And see *Finley v. King*, 3 Pet. 346, 377.

For examples of what is or is not a reasonable time for the performance of a condition when no time is specified, see *Hamilton v. Elliott*, 5 S. & R. (Pa.) 375, 383; *Hayden v. Stoughton*, 5 Pick. (Mass.) 528; *Ross v. Tremain*, 2 Metc. (Mass.) 495; *Ellis v. Kyger*, 90 Mo. 600 (3 S. W. 23); *Adams v. Ore Knob Copper Co.*, 7 Fed. 634; *Upington v. Corrigan*, 151 N. Y. 143, 154 (37 L. R. A. 794); *Bouvier v. Baltimore, &c., R. Co.*, 65 N. J. Law 313 (47 Atl. 772, 777). In this last case many of the older authorities are cited, stating “divers diversities.” And see 2 Tuck. Com. (96); 2 Wash. R. P. (5th ed.) 449; 2 Devlin on Deeds, § 972; note to *Cross v. Carson*, (Ind.) 44 Am. Dec. 749.

¹ DOES THE RULE AGAINST PERPETUITIES APPLY TO CONDITIONS SUBSEQUENT.—This subject has already been touched on in § 256, *supra*, where it was seen that the doctrine in the United States is that the Rule against Perpetuities is not applicable to conditions subsequent. The contrary, however, is held in England. See *In re*

In an oft-quoted passage in Sheppard's *Touchstone* (p. 149), the law is thus laid down: "It is a rule of the common law that none may take advantage of a condition but parties and privies in right and representation, as heirs of natural persons, executors, etc., and the successors of politic persons; and that neither privies nor assignees in law, as lords by escheat; nor in deed, as grantees of reversions; nor privies in estate, as he to whom a remainder is limited, shall take benefit of entry or re-entry by force of a condition." And in *Ruch v. Rock Island*, 97 U. S. 693, 696, it is said: "If the conditions subsequent were broken, that did not *ipso facto* produce a reverter of the title. The estate continued in full force until the proper steps were taken to consummate the forfeiture. This could be done only by the grantor in his life-time, and after his death by those in privity of blood with him. In

The Trustees of Hollis' Hospital, &c., [1899] 2 Ch. D. 540, where it was decided that a right of entry for condition broken is within the operation of the rule. For discussion of this case, see 13 Harv. L. R. 407 (re-printed in 5 Va. L. R. 721).

In Gray's *Restraints on Alienation* (2d ed.) § 42, note, it is said: "There is no reason in the history of the law, or in its principles, why the Rule against Perpetuities should not be applied to conditions. The reason sometimes given for applying it to an executory devise and not to a condition, that the former cannot be released while the latter can be, is unsound, for an executory devise to A and his heirs may always be released by A, and yet is unquestionably within the rule. The practical inconvenience of not applying the rule to conditions is great, especially in America, where all a man's children are his heirs, and where, a generation after his death, his heirs may be half a hundred or more in number, and scattered all over the continent."

But the learned author adds: "Notwithstanding all this, there have been many cases in America where conditions obnoxious to the Rule against Perpetuities have been sustained; and although they have been upheld without apparently the objection of remoteness occurring to either court or counsel, they form a body of precedents which it would take some courage to overthrow."

See *Guild v. Richards*, 16 Gray (Mass.) 309; *French v. Old South Society*, 106 Mass. 479; *First Universalist Society v. Boland*, 155 Mass. 171; *Cowell v. Springs Co.*, 100 U. S. 55.

the meantime, only a right of action subsisted, and that could not be conveyed so as to vest the right to sue in a stranger." And see *Schulenberg v. Harriman*, 21 Wall. 44, 63; *Jackson v. Topping*, 1 Wend. (N. Y.), 388 (19 Am. Dec. 515); *Craig v. Wells*, 11 N. Y. 315; *Nicoll v. New York, &c., R. Co.* 12 N. Y. 121; *Underhill v. Saratoga, &c., R. Co.* 20 Barb. (N. Y.) 455; *Guild v. Richards*, 16 Gray (Mass.) 309; *Bangor v. Warren*, 34 Me. 324 (56 Am. Dec. 657); *Southard v. Central, &c., R. Co.* 26 N. J. Law, 13; *Bouvier v. Baltimore, &c., R. Co.* (N. J.) 47 Atl. 772; *Higbee v. Rodeman*, 129 Ind. 244 (28 N. E. 442); *Fowlkes v. Wagoner* (Tenn.), 46 S. W. 586, 591; *Kellam v. Kellam*, 2 Patt. & H. (Va.), 357; note to *Cross v. Carson* (Ind.), 44 Am. Dec. 758.

It will be seen by the above extract from the *Touchstone* that the doctrine of the common law, which forbade a stranger to meddle with conditions, and confined them, as to reservation and enforcement, to the grantor and his privies in blood, was applied (1) to all assignments by the grantor, and this whether a reversion remained in him or not, and (2) to a limitation over, after the breach of a condition subsequent by the first taker, in favor of a third person. As to the limitation over, the doctrine of the common law has been stated in § 212, *supra*, where it was seen that such a limitation was void at common law, but is permitted in a devise, or in a deed by way of use, under the name of a conditional limitation. And such a limitation is now good in Virginia under the statute of grants. See § 234, *supra*.

As to assignments by the grantor, a distinction must now be made between a grantor on a condition subsequent in whom there remains a reversion after a term of years or an estate for life, and a grantor who has parted with his entire interest, and in whom there remains nothing but the right of entry, or of action, for the breach of the condition. In the former case, by statute of 32 Hen. VIII, c. 34, assignees of reversions expectant on particular estates "for term of life or lives, or for term of years," were allowed to take advan-

tage of conditions broken; but in other cases, the interest of a grantor in fee on breach of a condition subsequent by the grantee, which is a mere possibility of reverter, remained non-assignable as at common law. For discussion of the statute of Henry VIII., see Shepp. Touch. 150; Williams, Real Prop. (17th ed.), 391; *Nicoll v. New York, &c., R. Co.* 12 N. Y. 121, 131; *Van Rensselaer v. Ball*, 19 N. Y. 100; note to *Dumpor's Case*, 1 Sm. L. C. (7th ed.) 110.

For the Virginia statute based on that of 32 Henry VIII., see C. V. § 2781. It is as follows: "A grantee or assignee of any land let to lease, or of the reversion thereof, and his personal representative or assigns, shall enjoy against the lessee, his heirs, personal representative or assigns, the like advantage by action or entry for any forfeiture . . . which the grantor, assignor, or lessor, or his heirs might have enjoyed." As to "conveyances or devises of rents in fee, with powers of distress and re-entry," see C. V. § 2783.

But though the statute of Henry VIII. does not apply to the assignment of a bare right of entry for breach of a condition subsequent, there are more recent English statutes which enable the assignee of such right to enforce it, and this whether he claims under the grantor by deed or by devise. As to a devisee, the Wills Act of 1 Victoria (1 Vict. c. 26, § 3) makes devisable "all rights of entry for condition broken, and other rights of entry" (1 Jarman, Wills, Bigelow's ed., p. 75; 2 Id, App. B, p. 798). As to an assignee, the statute of 8 and 9 Vict. c. 106, § 6 declares that "a right of entry, whether immediate or future, and whether vested or contingent, may be disposed of by deed." And there are statutes on the subject in several of our States. See *Southard v. Central R. Co.*, 26 N. J. Law, 13; *Cornelius v. Ivins*, Ib. 376; *Bouvier v. Baltimore, &c., R. Co.* (N. J.) 47 Atl. 772; *Methodist, &c., Church v. Henderson*, 40 S. E. (N. C.), 691. For a discussion of the law of Virginia, see § 276, *infra*.

§ 276. Breach of Condition Subsequent—Is a Possibility of Reverter Alienable in Virginia.—This question is ably and

elaborately discussed in the briefs of counsel in *King v. Norfolk, &c.*, R. Co. 99 Va. 625; but as the restrictive clauses were held to be covenants and not conditions, the court did not find it necessary to express any opinion on the point. The contention of counsel for the railroad, after a review of the Virginia statutes, was as follows: "The salutary rule of the common law limits to the grantor and his heirs the right of re-entry upon forfeiture for the breach of a condition subsequent in a deed, and this rule has not been modified as to a possibility of a reverter in Virginia. Such a right is limited [*i. e.*, confined] to the grantor and his heirs, because it is not land nor an interest in land. It is a mere possibility of reverter for a forfeiture, and cannot, therefore, properly be made the subject of a devise or conveyance, or be aliened in any way."

In reaching this conclusion, great reliance is placed on the case of *Upington v. Corrigan*, 151 N. Y. 143 (37 L. R. A. 794), in which it was decided that under the New York statutes a right of entry for condition broken by grantee in fee simple is not devisable; and in which the earlier cases in that State which had held that such a right is not assignable are approved. See *Nicoll v. New York, &c.*, R. Co., 12 N. Y. 121; *Underhill v. Saratoga R. Co.*, 20 Barb. (N. Y.) 455; *Towle v. Remsen*, 70 N. Y. 303.

In *Upington v. Corrigan*, *supra*, it was conceded by counsel for the devisee that a right of re-entry was not devisable at common law; and the court held that the common law was not changed by the provision of the Revised Statutes that "every estate and interest in real property descendible to heirs may be devised." The court said: "In this case, as it is in every case of a deed of the fee upon condition subsequent, the grantor parted with every interest and estate in the real property conveyed. . . . That which the grantor retained was never regarded as an interest in real property, or as an assignable chose in action, and cannot be deemed such through any construction of our statute." And it was further said:

"We would be without warrant in asserting the existence of any estate in Mrs. Davey [the grantor] in the premises granted to Hughes [in fee on condition subsequent], whether at common law or under the Revised Statutes. She had an election to enter for condition subsequent, and she could release her right to do so. To those rights her heirs, after her decease, succeeded by force of representation and not by descent. There was no estate upon which the Statute of Descents could operate; but as heirs there devolved upon them the bundle or aggregate of rights which resided in, and survived the death of, the grantor, their ancestor. Her legal personality was continued in them."

But while this may be the true construction of the New York statute (though see *Hayden v. Stoughton*, 5 Pick. (Mass.), 528; *Austin v. Cambridgeport*, 21 Id. 215; *Clapp v. Wilder*, 176 Mass. 332; *Kenner v. American Contract Co.* 9 Bush (Ky. 202), it is certain, as has been shown in § 275, *supra*, that rights of entry for condition broken have been made devisable in England by the express language of the Wills Act of 1 Victoria, c. 26, and assignable by the statute of 8 and 9 Vict. c. 106, § 6. Both of these statutes were in the hands of the Revisors of the Virginia Code of 1849. The latter statute was reported by the Revisors to the Legislature in almost its very words, but was extended by them so as to make the interests therein embraced disposable *by will* as well as by deed (see Report of Revisors, p. 602, § 5 and note).

But as enacted by the Legislature (Code of 1849, Ch. 116, § 5; Code of 1887, § 2418) the statute reads: "Any interest in or claim to real estate may be disposed of by deed or will." As is said by Moncure, J., in *Carrington v. Goddin*, 13 Grat. 587: "Instead of adopting that section [*i. e.*, § 6 of the statute of 8 and 9 Vict. c. 106], which is complicated in its details, the legislature enacted the provision above quoted. Their object was to use brief and plain terms, which would be at least as extensive in their meaning as the terms used in the statute of Victoria. They could not have used more

comprehensive terms than they did." And see *Young v. Young*, 89 Va. 675, 678; *Nutter v. Russell*, 3 Metc. (Ky.), 163. For the full text of the English statute, and the statute as proposed by the Revisors, see note below.¹

¹ ALIENATION OF RIGHT OF ENTRY FOR BREACH OF CONDITION SUBSEQUENT.—By 8 & 9 Vict., c. 106, § 6: "After the 1st of October, 1845, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed."

As reported by the Revisors of 1849 (Ch. 116, § 5, p. 602 of the Report), the section reads as follows: "A contingent, an executory, and a future interest, and a possibility coupled with an interest in any real estate, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, and a right of entry, whether immediate or future, and whether vested or contingent, into or upon any real estate, may be disposed of by deed or will."

The language of these enabling acts seems broad enough to cover not only the alienation of a right of entry of an owner out of possession of his land, of which another has adverse possession (as to which see § 123, *supra*), but the alienation of a right of entry, before or after breach, by a grantor of land on condition subsequent. In the note to the Report of the Revisors (p. 602) attention is called to the change of the law in the first respect, viz., in allowing the sale of what were called "pretensed titles," but it is added: "The provision of the late English statute, adopted in the section to which this note is appended, accomplishes this object, and at the same time changes some other antiquated rules which created impediments in the way of a man's transferring interests of a certain kind though they belong to him."

As is stated in the text, the form of the statute as enacted by the Virginia Legislature is, "Any interest in or claim to real estate may be disposed of by deed or will"—a change, it is believed, made for the sake of brevity, and not altering the effect of the longer form set out above. If this be true, then, as is contended in the text, the right of entry on a grant of a fee-simple on condition subsequent is disposable, before or after breach, by deed or by will—a

As to the Wills Act of 1 Victoria, which, as has been seen, expressly made devisable "rights of entry for condition broken and other rights of entry," the Revisors of the Code of 1849 declare on p. 623 of their report that they "have adopted nearly the whole of that statute." But § 3, containing the language above quoted, is exceedingly long, and was reported by the Revisors in a shortened form. As enacted by the legislature (Code of 1849, c. 122, § 1; Code of 1887, § 2512), it reads as follows: "Every person not prohibited by the following section may by will dispose of any estate to which he may be entitled at his death, and which if not so disposed of would devolve upon his heirs, personal representatives, or next of kin." But that the word "estate" is not here used in any technical sense is manifest from the next sentence of the same section: "The power hereby given shall extend to any estate, *right* or *interest* [italics supplied] to which the testator may be entitled at his death," etc. And see C. V. Ch. 2, § 5, cl. 10: "The word 'land' or 'lands,' and the words 'real estate' shall be construed to include lands, tenements, and hereditaments, and all rights thereto, and interests therein, other than a chattel-interest."

Under the familiar rule of construction, § 2512 and § 2418 are to be construed together, and it would seem that they authorize the alienation, by deed or by will, of rights of entry for condition broken. It is hardly conceivable that the Revisors desired to restrict the scope of the English statute in conferring the power of alienation; and § 2418 is broad enough alone to render all rights of entry alienable by deed or devise. This being so, it was unnecessary to confer the power again in express terms by the Wills Act; but it is noticeable that § 2512, taking the two sentences together, gives the power to dispose by will of any "right" to which a testator is entitled at his death, and which if undisposed of would "devolve" upon his heirs—thus conforming precisely to the

power of disposition, it is believed, demanded by a sound public policy under the improved conditions of modern civilization.

language in which the nature of a right of entry is described in the extract from *Upington v. Carrington*, p. 374, *supra*.

§ 277. **Condition Subsequent—Mode of Enforcement of Forfeiture for Breach.**—Assuming that there has been a breach of a valid condition subsequent, the estate vested in the grantee does not cease in him, and re-vest in the grantor *ipso facto*, but remains unimpaired in the grantee until entry, or its equivalent, by the grantor or his heirs. For the grantor or his heirs may waive the right to enforce the forfeiture; and though there has been no express waiver, and the estate of the grantee is still liable to forfeiture, the law, in favor of the vested estate, will not permit its destruction until the right to forfeit has been exercised. See note to *Cross v. Carson* (Ind.), 44 Am. Dec. 754; *Chalker v. Chalker*, 1 Conn. 79 (6 Am. Dec. 206); *Spear v. Fuller*, 8 N. H. 174 (28 Am. Dec. 391); *Thompson v. Thompson*, 9 Ind. 323 (68 Am. Dec. 638); *O'Brien v. Wagner*, 94 Mo. 93 (4 Am. St. Rep. 362); *Preston v. Bosworth*, 153 Ind. 458 (74 Am. St. Rep. 313); *Hubbard v. Hubbard*, 97 Mass. 188; *Langley v. Chapin*, 134 Mass. 82; *Schulenberg v. Harriman*, 21 Wall. 44; *Little Falls, &c., Co. v. Belin*, 69 Minn. 253 (72 N. W. 69); *Bonniwell v. Madison*, 107 Ia. 85 (77 N. W. 530); *Robinson v. Ingram* (N. C.) 35 S. E. 612; *Houston, &c., R. Co. v. Compress Co.* (Tex. Civ. App.) 56 S. W. 367; *Lewis v. Lewis* (Conn.), 51 Atl. 854.¹

¹ **TERM OF YEARS—EFFECT OF BREACH OF CONDITION SUBSEQUENT ANNEXED THERETO.**—In Taylor's *Landlord and Tenant* (8th ed.), § 492, it is said: "There was, however, a distinction formerly drawn between leases [for years] that were declared to be *void* upon a breach of condition, and such as were *voidable* only. In the case of a lease for lives [*i. e.*, of freehold], if the lessee was guilty of any breach of the condition the lease was only voidable, although by its express terms it was to become thereby void; and the landlord might waive his right to re-enter by the acceptance of rent, or by some other act which amounted to a dispensation of the forfeiture. But upon the breach of such a condition [*i. e.*, to be void] in a lease for years, the lease [formerly] became *ipso facto*

As to the mode of exercise of the right to enforce a forfeiture, the common law required in order to divest an estate of freehold (unless the grantor was already in possession at the time of the breach) an entry on the land, in order that the estate, which had vested by entry and livery of seisin, should

void, and no subsequent recognition could set it up again. Yet if the condition in such a case was merely *that the lessor might re-enter* the lease was voidable only, and might be affirmed by the acceptance of rent, if the lessor had notice of the breach at the time. But the force of this distinction [as to leases for years] has been almost, if not quite, abated by the modern decisions, which establish that the effect of a condition making a lease [for years] void upon a certain event, is to make it void at the option of the lessor only, in cases when the condition is for his benefit, and he actually exercises the privilege."

In *Clark v. Jones*, 1 Denio (N. Y.) 516 (43 Am. Dec. 706), Bronson, C. J., says of the modern doctrine as to leases for years on condition subsequent: "It is a far-reaching principle of the common law that a party shall not be allowed to take advantage of his own wrong; and courts will not so construe the contract as to enable the lessee to put an end to it, at pleasure, by his own improper conduct." See also *Milton v. Kephart*, 18 Gratt., 1, 8; *Deaton v. Taylor*, 90 Va. 219; *Bowyer v. Seymour*, 13 W. Va. 12; *Guffy v. Hukill*, 34 W. Va. 49 (26 Am. St. Rep. 901, and note); *Peacock, &c., Co. v. Brooks &c., Co.*, 96 Ga. 542 (23 S. E. 835); *Wills v. Gas Co.*, 130 Pa. St. 222 (18 Atl. 721); *Ray v. Western Gas Co.*, 138 Pa. St. 576 (21 Am. St. Rep. 922).

As to the mode of enforcement of a forfeiture of an estate for years, a distinction exists at common law according as the cause of forfeiture is the non-payment of rent, or the doing or omission to do some other act. In the latter case, where the default is other than the non-payment of rent, the option of the lessor to make the lease void, need not be demonstrated, by entry (unless it be so stipulated), "for a lease for years may begin without ceremony, and so may end without ceremony" (*i. e.*, without formal entry). 2 Tho. Co. (87); 2 Min. Ins. 269. But while an entry is not required, doubtless there must be either an entry, or an action of ejectment, or otherwise some unequivocal act to manifest the intent of the lessor to treat the lease as forfeited. 2 Tayl. L. & T., § 488; note to *Guffy v. Hukill* (W. Va.), 26 Am. St. Rep. 912.

But when the breach of the condition subsequent is the non-payment of rent, it is held at common law, and in a number of the

be divested by the equal notoriety of entry and the resumption of that seisin. 2 Min. Ins. (4th ed.) 267; note to *Cross v. Carson* (Ind.), 44 Am. Dec. 755. But in modern practice, the forfeiture is usually enforced by the action of ejectment; and in order to bring this action no actual entry is required at common law, and it is dispensed with by the provisions of the statutory action. *Ruch v. Rock Island*, 97 U. S. 693; *Cowell v. Springs Co.* 100 U. S. 55; *Plumb v. Tubbs*, 41 N. Y. 442; *Cornelius v. Ivins*, 26 N. J. Law, 376; *Bouvier v. Baltimore, &c., R. Co.* (N. J.), 47 Atl. 772; *Ritchie v. Kansas, &c., R. Co.* 55 Kansas, 36 (39 Pac. 718); *Sioux City, &c., R. Co. v. Singer*, 49 Minn. 301 (32 Am. St. Rep. 554);

States, that where the lease provides for re-entry on the tenant's default, the landlord, if he desires to exercise this right, must make a previous demand for the exact amount of the rent "on the very day the rent becomes due, at a convenient time before sunset, at the particular place at which the rent is made payable by the terms of the lease, or if there be no place stipulated in the lease, the demand must be made at the most notorious place on the land demised, which, if there be a dwelling house, is the front door." See § 59, *supra*. Also 2 Lom. Dig. 711; 2 Taylor, L. & T. 493; note to *Guffy v. Hukill* (W. Va.), 26 Am. St. Rep. 912; *Bowyer v. Seymour*, 13 W. Va. 12; *Johnston v. Hargrove*, 81 Va. 118; *Henderson v. Carbondale, &c., Co.*, 140 U. S. 25.

The above rule as to demand and re-entry in order to enforce the forfeiture of a lease when the default is the non-payment of rent, does not prevail in some of the States. Note to *Guffy v. Hukill*, 34 W. Va. 49, in 26 Am. St. Rep. 913. And in *Guffy v. Hukill*, *supra*, it is held that it does not apply in case of a lease for years which contains a clause of forfeiture for breach of covenant to pay rent, but no clause of re-entry; and that in such case the intention of the lessor to enforce the forfeiture of his lease of land to A could be manifested by the execution, after A's breach, of a lease of the same land to B.

The Virginia statute (C. V., § 2796) allowing the service of a declaration in ejectment to take the place of demand and re-entry on a tenant's default in payment of rent is set out above in the text. A similar statute is in force in West Virginia. For the Virginia and West Virginia cases construing the statute, see § 59, *supra*.

Ruddick v. St. Louis, &c., R. Co. 116 Mo. 25 (38 Am. St. Rep. 570); *Johnston v. Hargrove*, 80 Va. 118; *Bowyer v. Seymour*, 13 W. Va. 12; *Martin v. Ohio R. Co.* 37 W. Va. 349 (16 S. E. 589). See § 59, *supra*.¹

¹ FORFEITURE OF FREEHOLD ESTATE WHEN THE GRANTOR IS IN POSSESSION.—It is well settled that if, at the time of the breach of a condition subsequent, the grantor is in possession of the land, a forfeiture may take place without entry; for the grantor cannot enter upon his own possession, and where an entry cannot be made, none can be required. *Thompson v. Thompson*, 9 Ind. 323 (68 Am. Dec. 638); *Hubbard v. Hubbard*, 97 Mass. 188 (93 Am. Dec. 75); *Hamilton v. Elliott*, 5 S. & R. (Pa.) 374; *Guffy v. Hukill*, 34 W. Va. 49 (26 Am. St. Rep. 901); note to *Cross v. Carson* (Ind.), 44 Am. Dec. 756.

Of course, however, a grantor in possession is not debarred from waiving the forfeiture; and the question arises, must the grantor, though he cannot enter, manifest his intent to claim the forfeiture by some act or declaration to that effect, or does the forfeiture take place, as of course, unless the grantee can show what amounts to a waiver by the grantor? The latter seems to be the better opinion.

In 2 Wash. Real. Prop. (5th ed.) 18, the law is thus laid down: "If the grantor is himself in the possession of the premises when the breach happens, the estate revests in him at once without any formal act on his part, and he will be presumed after breach to hold for the purpose of enforcing a forfeiture, unless he waive the breach as it is competent for him to do, and as he may do by his acts." See, in accord, *O'Brien v. Wagner*, 94 Mo. 93 (4 Am. St. Rep. 362), where it is said (after quoting the language of Washburn, *supra*): "Of course this presumption [of intent to enforce forfeiture] is one of fact, and may be overcome by evidence, and the evidence may consist in the acts and declarations of the party in possession." And see *Adams v. Ore Knob Copper Co.*, 7 Fed. Rep. 634, where it is said of a grantor in possession: "Mere silent acquiescence in an act which had constituted a breach of an express condition would not amount to a waiver of the right of forfeiture for such breach."

On the other hand, in most of the cases where the grantor has been in possession at the time of the breach, and a forfeiture has been adjudged to take place without any formal act of entry on his part, there were words or acts of the grantor indicative of his intent to enforce the forfeiture; and it has been held that the

The language of the Virginia statute dispensing with entry in order to enforce a breach of a condition subsequent, and authorizing an action of ejectment in lieu thereof, is as follows: "Any person who shall have a right of re-entry into lands by reason of any rent issuing thereout being in arrear, or by reason of the breach of any covenant or condition, may serve a declaration in ejectment on the tenant in possession, where there shall be such tenant, or if the possession be vacant, by affixing the declaration upon the chief door of any messuage, or at any other notorious place on the premises, which service shall be in lieu of a demand and re-entry; and upon proof to the court by affidavit in case of judgment by default, or upon proof on the trial, that the rent claimed was due, and no sufficient distress was upon the premises, or that the covenant or condition was broken before the service of the declaration, and that the plaintiff had power thereupon to re-enter, he shall recover judgment, and have execution for such lands." C. V. § 2796. See 2 Tayl. L. and T. §§ 493-4.¹

grantor must, when in possession, manifest, by express claim or some unequivocal act, an intent to treat his possession after breach as changed from its former character, and as now existing by virtue of ownership by reason of the grantee's forfeiture. See *Willard v. Henry*, 2 N. H. 120; *Frost v. Butler*, 7 Greenl. (Me.) 225 (22 Am. Dec. 199); *Lincoln, &c., Bank v. Drummond*, 5 Mass. 321; *Hubbard v. Hubbard*, 97 Mass. 188 (93 Am. Dec. 75); *Richter v. Richter*, 111 Ind. 456 (12 N. E. 698).

It is believed that the case would be rare where the fact of the grantor's possession would stand alone; and where there would not be, after the grantee's breach, either acts of ownership on the part of the grantor, or else acts of waiver by him, sufficient to decide the question of his intent to enforce or not to enforce the forfeiture incurred by the grantee.

¹ EFFECT OF ENFORCEMENT OF FORFEITURE FOR BREACH OF CONDITION SUBSEQUENT.—In 2 Min. Ins. (4th ed.) 275, the law is thus stated: "Re-entry, in the case of conditions *express*, invests the grantor or his heirs *with their original estate*, and therefore defeats all rights and incidents annexed to the estate which is determined by the re-entry,—such as dower and curtesy, and all charges and encumbrances created by the grantee during his pos-

§ 278. **Condition Subsequent—No Damages at Law for Breach.**—A bare, naked condition, unaccompanied by any words importing an undertaking to abide by or perform it, cannot be enforced as a covenant, and damages recovered for its breach. The only remedy at law is to enforce a forfeiture. This is held in the leading case of *Palmer v. Plank-road Co.* 11 N. Y. 376, in an able opinion by Selden, J., who, after reviewing the authorities, states the reason of the law as follows: "But upon principle, independent of all authority, it would seem impossible to come to any other conclusion. It by no means follows because a grantee consents to take an estate subject to a certain condition that he also consents to obligate himself personally to the performance of the condition. Many cases might be imagined in which one would be willing to risk the forfeiture of the estate, while he would be altogether unwilling to incur the hazard of personal responsibility in addition. The doctrine which the plaintiffs in this case are driven to maintain is, that to assent to the condition is to assent to the personal liability; that the one involves the other. I can see no sufficient ground for such an assumption; the two things are essentially distinct, and involve risks different in nature as well as degree." See § 257, *supra*.

The above doctrine, that no damages can be recovered at law for breach of a mere condition, has received approval in

session. For upon the re-entry of the grantor he becomes seised of an estate paramount to that which was liable to these charges. 2 Tho. Co. Lit. 97 (99 n. W. 2). But in the case of conditions *implied*, as we have seen, the grantor or his heirs, upon re-entry, claim under, and not paramount to, the grantee, and consequently none of the latter's charges or encumbrances are avoided by the re-entry, but the grantor or his heirs take subject to them." See, in accord, 1 Shep. Touch. 155. And see § 212, *supra*. on p. 239.

In *Bowyer v. Baltimore, &c., R. Co.* (N. J.), 47 Atl. 777, 776, it is said: "At common law, upon an entry by the grantor for breach of condition, his entry defeated the livery made on the creation of the estate, and consequently all subsequent estates and remainders dependent thereon were extinguished." And see *Schlesinger v. Kansas City, &c., R. Co.*, 152 U. S. 444.

Jackson v. Florence, 16 Johns. Rep. 47; *Underhill v. Saratoga, &c.*, R. Co. 20 Barb. (N. Y.) 455; *Bethlehem v. Annis*, 40 N. H. 34 (77 Am. Dec. 700); *Blanchard v. Detroit, &c.*, R. Co. 31 Mich. 42 (18 Am. Rep. 142); *Close v. Burlington, &c.*, R. Co. 64 Ia. 149 (19 N. W. 886); *Indianapolis, &c.*, R. Co., v. *Hood*, 66 Ind. 580; *Mills v. Seattle, &c.*, R. Co. 10 Wash. 520 (39 Pac. 246); *Brown v. Chicago, &c.*, R. Co. 82 N. W. 1003. And see note to *Ecroyd v. Coggeshall* (R. I.), 79 Am. St. Rep. 759.

In *Hale v. Finch*, 104 U. S. 261, 269, it is said: "It is the case of a bare, naked condition, unaccompanied by words implying an agreement, engagement, or promise by the vendee that he would personally perform, or become personally responsible for its performance. The vendee took the property subject to the right which the law reserved to the vendor of recovering it on the breach of the condition specified. The vendee was willing, as the words in their ordinary and natural sense indicate, to risk the loss of the steamboat when such breach occurred, but not to incur the personal liability which would attach to a covenant or agreement on his part. . . . If this were not so, then every condition in a deed or other instrument, however bald that instrument might be of language implying an agreement, could be turned by mere construction, and against the apparent intention of the parties, into a covenant involving personal responsibility." See *Weir v. Simmons*, 55 Wis. 637 (13 N. W. 873); *Taylor v. Sutton*, 15 Ga. 103 (60 Am. Dec. 682); *Hammond v. R. Co.* 15 S. C. 10.¹

¹ CONDITION PREFERRED BY THE GRANTEE.—In two of the cases cited on p. 383, viz., *Blanchard v. Detroit, &c.*, R. Co., 31 Mich. 43, and *Mills v. Seattle, &c.*, R. Co., 10 Wash. 520, the peculiar feature was presented that (against the opposition of the grantor who preferred covenant), it was the grantee who contended that the provision was a condition, and that the grantor's remedy, if any, was to enforce a forfeiture—a contention which was sustained by the court. It is the usual case that the grantor contends for condition, while the grantee claims that the provision

In applying the above doctrine, it must be remembered that it is predicated of a "bare, naked condition," and a preliminary question arises whether the provisions may not be upon its true construction a covenant, and not a condition at all. And, further, though there be a condition, the same provision may also contain a covenant, and the grantor may elect to proceed upon either. See *Jackson v. Topping*, 1 Wend. (N. Y.), 388 (19 Am. Dec. 515), where a deed was made by a father to his son in consideration of a covenant on the part of the grantee to maintain the grantor and pay his debts, on condition that if he failed to do so, the grantor should have right of re-entry, and the court said: "Not satisfied to rely on a covenant of the grantee to pay, he proceeds to convey the estate on condition." And see *Livingston v. Stickles*, 8 Paige 398, where it is said (p. 402): "If it were a mere condition, then it is evident the only remedy of the lessor would be by a proceeding against the purchaser to recover the premises for breach of condition. But a clause of this kind may be so framed as to operate both as a covenant and as a condition, so as to give the lessor an election either to proceed by an action of covenant to recover damages for a breach thereof, or by an ejectment to enforce the forfeiture."¹

is a covenant only, and seeks to escape forfeiture (see *King v. Norfolk, &c., R. Co.*, 99 Va. 625); and the rule of construction which favors covenant rather than condition is based on the presumption—true in most cases—that a covenant is more favorable to the grantee. See § 257, *supra*. In *Blanchard v. Detroit, &c., R. Co.*, the court said: "The position of these parties confounds the reason of this rule, and would dispense with the rule itself if the case were a doubtful one."

¹DAMAGES IN TEXAS FOR BREACH OF CONDITION.—In *Chicago, &c., R. Co. v. Titterington*, 84 Texas 218 (31 Am. St. Rep. 39), it is said in a *dictum* (the provisions of the deed being held covenants only, and not conditions): "Of course, in the case of a condition subsequent broken, the grantor has his election to re-enter and reclaim the land, or to sue for damages for a breach of the contract."

The only authority cited is *Gulf, &c., R. Co. v. Dunman*, 74

§ 279. **Condition Subsequent—No Specific Performance in Equity.**—It has been seen (§ 278, *supra*), that on a “bare, naked condition” (*i. e.*, a condition *simpliciter*, unaccompanied by agreement or covenant) no action lies at law to recover damages for its non-performance. As the ground of this doctrine is the option of the grantee to perform or not perform the condition (subject to forfeiture for its breach), it follows, *a fortiori*, that specific performance cannot be decreed by a court of equity, as this would deprive thereby to the hazard of forfeiture. And the law is so laid down in well considered cases.

In *Blanchard v. Detroit, &c., R. Co.* 31 Mich. 43 (18 Am. Rep. 142), it is said (p. 52): “The result upon the whole is that the provision relied on by the complainant as a covenant to be specifically enforced against the defendants must be considered an express condition subsequent, and not a covenant, and not specifically enforceable against the defendants as one.” And see, in accord, *Close v. Burlington, &c., R. Co.* 64 Ia. 149 (19 N. W. 886).

In *Sharon Iron Co. v. City of Erie*, 41 Pa. St. 341, 351, the law is thus stated: “The clause in the original resolution

Texas 267 (11 S. W. 1094), in which, however, it seems that the provision in the deed was construed to be both covenant and condition. The court said: “The defendant having agreed with plaintiff that it would, in consideration of his conveyance to it of the land and privileges in controversy, during the time it held them fill his tank with water every seven days, not to exceed 5,000 gallons, and to surrender the land and privileges when it ceased to do so, must be held liable in this action for the entire obligation.”

In *Gulf, &c., R. Co. v. Dunman*, *supra*, the plaintiff recovered, in one action, both the land and damages for failure to fill the tank as agreed. This is contrary to the *dictum* in *Chicago, &c., R. Co. v. Titterington*, *supra*, where it was said that the grantor *had an election* between recovery of damages and the enforcement of the forfeiture. And see, as to election when a deed contains both covenant and condition, *Stuyvesant v. Davis*, 9 Paige 427; *Underhill v. Saratoga, &c., R. Co.*, 20 Barb. 455, 467.

incorporated into the deed was a condition and not a covenant, and where language imports a condition merely, and there are no words importing an agreement, it cannot be enforced as a covenant, but the only remedy is through a forfeiture of the estate."

In *Woodruff v. Woodruff*, 44 N. J. Eq. 349 (1 L. R. A. 380) it is said: "It is necessary to determine whether the provision in the deed in question is a condition or a covenant. If it be a condition, specific performance of it will not be decreed. . . . This court can, in a proper case, enforce the specific performance of a covenant; but it cannot enforce the specific performance of that in a deed a non-performance of which works a forfeiture of the estate." See § 257, *supra*.

If then there is no specific performance of a condition subsequent in equity (as the above cases declare), nor any action at law for damages for its breach (as has been seen in § 278, *supra*), it results that such a condition is not binding on the grantee personally, and the grantor's remedy for its breach is *in rem* only *i. e.*, against the land, by the enforcement of forfeiture.

But this conclusion is opposed to the statement of the law in 2 Min. Ins. (4th ed.) 277, where it is said: "The person who takes possession of the land in pursuance of the grant, *is bound* to perform the conditions, and bound *personally*, although it may be accompanied by *ruinous loss* to him. He takes the estate *cum onere*." And in 6 Am. & Eng. Ency. Law (2d ed.), 505, it is said: "One who accepts a conditional estate is bound personally to the performance of the condition, although it may be accompanied by loss; he takes the estate *cum onere*." And similar statements of the law are to be found in the text-books, and in some of the cases.

It is believed, however, that the true doctrine is that there is no personal liability to perform a condition subsequent, as such, and that the cases apparently to the contrary are explainable on the ground that the provision enforced was

not, on its true construction, a condition at all, but a covenant or trust; or not a condition only, but a covenant as well as a condition. (See as to this, § 278, *supra*). And when this is the construction, that which is binding is not a condition (though that may be its form), but a covenant, which equity may enforce specifically (other requisites being present), or a trust reposed in the grantee or devisee, which equity will not suffer him to repudiate.¹

¹ CONDITION NOT PERSONALLY BINDING ON THE GRANTEE.—The authorities cited by Professor Minor for the opposite doctrine (quoted above in the text) are 2 Tho. Co. Lit. 99, n. (W. 2); 1 Lom. Dig. 348; *Vanmeter v. Vanmeter*, 3 Gratt. 148; *Crawford v. Patterson*, 11 Gratt. 364. In the *Am. & Eng. Ency. of Law*, where above quoted, the writer follows Prof. Minor (whom he cites) in the statement of the law, and relies on the Virginia cases cited by Prof. Minor, but refers, in addition, to *Rowell v. Jewett*, 71 Me. 408; *Att. Gen. v. Andrew*, 3 Ves. Jr. 633; *Hogeboom v. Hogeboom*, 24 Wend. (N. Y.) 148; and *Taylor v. Sutton*, 15 Ga. 103 (60 Am. Dec. 682).

In 2 Tho. Co. Lit. n. (W. 2), the language is: "With regard to conditions in general, it may be further observed that where an estate is given on condition, the taking possession of the land to which the condition is annexed binds to the performance of the condition, even though such performance should be attended with loss." The cases cited are *Att. Gen. v. Christ's Hospital*, 3 Bro. C. C. 165; *Duke of Montague v. Beaulieu*, 3 Bro. P. C. 277; *Att. Gen. v. Andrew*, 3 Ves. Jr. 633. In 1 Lom. Dig. 348, cited by Prof. Minor, the language is identical with that of the note to 2 Tho. Co. Lit. above quoted, and the cases cited are *Att. Gen. v. Christ's Hospital* and *Att. Gen. v. Andrew*, *supra*. It would seem, then, that the doctrine has its source in the cases cited in the note to 2 Tho. Co. Lit., and we must consider whether they sustain it.

In *Att. Gen. v. Christ's Hospital*, as reported in 3 Bro. C. C. 165, it is said that "an estate being devised to Christ's Hospital on condition of maintaining six children from the parish of St. Leonard, Shoreditch, and the hospital having taken possession, . . . Lord Chancellor [Thurlow] thought, whether the rents were or were not sufficient to maintain the number, the hospital, having taken possession of the estate, was bound to perform the condition, and that they should have considered of that pre-

In *Bird v. Hawkins* (N. J. Ch.), 42 Atl. 558, it is said: "It is declared by Chief Baron Eyre, in *Blake v. Bunbury*, 1 Ves. Jr., 523, to be 'the settled doctrine of a court of equity,

vious to taking possession.'" This is the whole of the opinion (by way of *dictum*, it seems), and in the editor's note it is said that the report is very incorrect throughout. From this note it appears that the devise was not "on condition," but *to the intent* that the children should be maintained, and that the Chancellor declared that "the defendants, having accepted the estates devised, are bound to observe the terms on which they are given." It seems clear that the devise to the Hospital was in trust and not on condition, and that the case is not authority for the doctrine as to conditions for which it has been cited.

The same explanation may be made of *Att. Gen. v. Andrew*, *supra*. The case is plainly one of trust, and is so treated throughout, both by counsel and court. The question was whether there had been an acceptance of what was conceded to be a trust, and it was held there had not been, the Chancellor saying: "I cannot hold that they have made an absolute definitive election to accept this trust." As to the third case, *Duke of Montague v. Beaulieu* (re-reported in 1 *English Reports* 1317), it was simply a devise of land for life to the testator's son, on a condition subsequent to be performed in a certain time, with a limitation over on the son's default; and on the failure of the son to perform, his estate ceased, and the land passed to the executory devisee.

The two Virginia cases cited by Prof. Minor are *Vanmeter v. Vanmeter*, 3 Gratt. 148, and *Crawford v. Patterson*, 11 Gratt. 364. In *Vanmeter v. Vanmeter*, a father executed a deed to his two sons conveying them certain lands in consideration of one dollar, and "that they had bound themselves to pay all debts" of the father. The court said: "By their acceptance of said deed and enjoyment of the subject [they] have acknowledged their personal liability for the debts of the grantor existing at the time of the execution of said deed, and the creditors have a right to enforce it. The condition was one which it was the right and duty of the grantor to exact for the benefit of his creditors, and is equivalent to a covenant on the part of the grantees." Here, though the court uses the word "condition" in a general way, it is obvious that there was no real condition at all, but only a covenant.

In *Crawford v. Patterson*, *supra*, a testator gave to his wife

and agreed on all sides, that no man shall be allowed to dis-appoint a will under which he takes a benefit; that it, he may not accept the benefits which the will confers without also

land, &c., for her life, and then added: "It is understood that my wife is to keep my children and raise them, and give them sufficient schooling." It is clear that these are not words of condition, but at most create a covenant or trust. The court said: "The will of Robert Crawford imposed a charge on the estate given to his wife. . . . The widow having accepted the estate, took it of course *cum onere*; and was bound to keep and raise the children and give them sufficient schooling."

It will be seen that in *Crawford v. Patterson* there was no question of condition in the true sense, and the same may be said of two other Virginia cases cited by Prof. Minor (2 Min. Ins. 741) for the doctrine of personal liability, from the acceptance of the estate, to perform a condition subsequent. These are *Hill v. Huston*, 15 Gratt. 350, and *Taliaferro v. Day*, 82 Va. 95. It is true that in both of the cases personal liability is predicated of a condition; but an examination of the cases, which space does not here permit, will show that the provision in each was in the nature of a covenant or charge, and not a true condition. See, too, *Hobson v. Whitlow*, 80 Va. 784.

Of the cases cited in the *Encyclopedia*, *supra*, it must suffice to say that they do not sustain the proposition that acceptance of a deed on a condition subsequent imposes personal liability on the grantee.

In conclusion it may be remarked, that in all the Virginia cases, the so-called condition was for the benefit of a third person, to whom a condition at common law could not be reserved, and who could not enter for its breach (§ 275, *supra*). Of such cases, Prof. Minor says (2 Min. Ins. 274): "In equity, however, a condition intended for the benefit of a third person will often be regarded as a trust, and be enforced in his favor as a charge upon the land, or upon the person holding the land, to which it is attached. Thus, a father having conveyed land to his son, on condition that he should pay his debts, a court of equity, at the instance of the creditors, will charge the debts as a trust on the lands in the hands of the grantee, or of the father's heir, if he has entered for the breach." Citing, among other cases, *Vanmeter v. Vanmeter* and *Crawford v. Patterson*, *supra*. See, in accord, *Weir v. Simmons*, 55 Wis. 637 (13 N. W. 873); *Isner v. Kelley* (W. Va.), 41 S. E. 158.

performing the duties which it imposes." But the question arises, what are the duties which the will imposes? Until these are ascertained, it cannot be known whether the will is disappointed or not. To fail to perform a mere condition subsequent does not disappoint the will, for the testator has chosen to leave its performance to the choice of the devisee, relying, in case of non-performance, on the law's redress by forfeiture, if the heirs choose to enforce it. As to duties, the devisee has no other duty than to submit to the forfeiture, if he elects to incur that risk. As we have seen (§ 278) his assent to the condition is not assent to personal liability; and to an attempt to enforce such liability he can truly say, "*non hæc in foedera veni.*"

But it must be remembered that in a will the *intention* is paramount, and that even the strongest words of condition will yield to the manifest intent of the testator to exact obedience to his wishes, and not to punish disobedience by forfeiture.

The leading case in England is *Wright v. Wilkin*, 2 Best & S. 232 (affirmed in Exchequer Chamber, *Ib.* 259), where there was a devise of land "upon this express condition," viz., that the devisee should pay certain legacies; and it was held, by aid of the context of the will, that these words did not create a condition, for the breach of which the heir of the testator could enter, but a trust, which the devisee, taking the legal estate, would in equity be bound to perform.

This decision, however, was placed on the *intention* of the testator, and the court did not accede to the suggestion that "what used to be construed a devise on condition would now be construed a devise upon trust" (as to which see § 260, n. 1, *supra*). On this point, Williams, J., said: "But I do not think that all words which formerly would have been looked on as creating conditions are now to be treated as trusts. . . . Looking at the language of this will altogether, I think we are more likely to effectuate the intention of the testatrix by construing it as a trust than as a condition."

See *Mills v. Davison*, 54 N. J. Eq. 659, 35 L. R. A. 113 (citing recent English cases); *Bird v. Hawkins* (N. J. Eq.), 42 Atl. 589 (where numerous American decisions are reviewed). And see 1 Pom. Eq. (2d ed.), § 460.

§ 280. **Condition Subsequent—Injunction in Equity.**—On the principles laid down in the two previous sections, it would follow that a court of equity would decline to enjoin a breach of a true condition subsequent. In one class of cases, however, viz., where there is a negative condition restricting the use of land (see § 262, *supra*), the distinction between covenant and condition seems to be disregarded—unless, indeed, such negative condition may be regarded as in its very nature contractual—and the jurisdiction of equity is established to prevent a breach by injunction, instead of leaving the grantor to punish it by exacting a forfeiture.

In 1 Pom. Eq. (2d ed.), § 460, the doctrine is thus laid down: "A court of equity may, by its restraining decree or injunction, compel the observance of stipulations in the nature of conditions by which some restraint is imposed upon the use or occupation of land conveyed, such as the provisions in a deed by which the grantee is forbidden to build in a certain manner, or to use the premises for certain purposes, thereby creating a servitude in favor of adjacent land of the grantor. Compelling the performance of such a stipulation, which perhaps may be in the form of a condition, by restraining its violation, is plainly not the enforcement of a forfeiture." And see 2 Pom. Eq. § 689, note; 3 Id. § 1295, note; also § 1342.

In the above extract, the language "stipulations in the nature of conditions," and "stipulation which perhaps may be in the form of a condition," might seem to indicate that the doctrine is only applicable when the construction of the restraining provision converts it into a covenant, whose breach would not involve a forfeiture. But this is not the meaning intended, and the cases show that equity will restrain the breach of a true condition, for which the grantor could

enter and enforce forfeiture. This was the character of the condition in the leading case of *Watrous v. Allen*, 57 Mich. 362 (58 Am. Rep. 363), as will be seen by reference to § 263, *supra*, where it is set out at length. And see *Cowell v. Springs Co.* 100 U. S. 55.

It seems, however, to be assumed in such cases that the negative condition amounts also to an agreement not to do what the condition forbids. Thus in *Watrous v. Allen*, *supra*, it is said by Cooley, J.: "The complainant is not entitled to enforce a forfeiture of the estate in equity, for equity does not aid in enforcing forfeitures. But on the hearing in this court, he does not claim a forfeiture, and only asks the enforcement of the condition as an agreement. This is a remedy much more favorable to the defendants than the remedy at law, for the equitable remedy only compels the party to abide by the agreement, while the remedy at law takes from him the property he had paid for, and operates as a punishment. Injunction, then, to restrain a breach of condition, if the condition is legal, is perfectly reasonable."

To the same effect is *Clark v. Martin*, 49 Pa. St. 289, where the condition is spoken of as if it were also an agreement imposing a duty on the grantee. But in this case the language of the condition would seem to readily admit of such construction. The grant was "upon this express condition, nevertheless, that the said [grantees] their heirs or assigns shall not build or erect, or suffer to be built or erected, on any part of the hereby granted lot of ground" certain buildings, etc.; and such condition, that one *shall not do*, would seem equivalent, on acceptance, to a *stipulation* not to do, on condition of forfeiture for breach of the agreement. And see *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35 (13 Am. Rep. 556), where the restriction is in the form of an express covenant, as is true of many other cases.

In the extract from *Pomeroy's Equity* above, it will be noticed that the building restriction is spoken of as "creating a servitude in favor of the adjacent land of the grantor." This is the ordinary case, and an injunction may then issue

on the theory of preventing an infringement of an equitable easement. And in 3 Pom. Eq. § 1342, it is said: "Restrictive covenants in deeds, leases, and agreements, limiting the use of land in a specified manner, or prescribing a particular use, which create equitable servitudes on the land, will be specifically enforced in equity by means of an injunction, not only between the immediate parties, but also against subsequent purchasers with notice, even when the covenants are not of a kind which technically run with the land."

The language above is confined to "covenants," but that a condition may create an equitable servitude, see 1 Pom. Eq. § 460, quoted above; *Whitney v. Union R. Co.* 11 Gray (Mass.) 359 (71 Am. Dec. 715); *Clapp v. Wilder*, 176 Mass. 332. In *Clapp v. Wilder*, however, in view of the situation of the grantor and the attendant circumstances, the condition was held personal to the grantor, and not to create a servitude in favor of land retained by him. (See § 262, *supra*.)

It is not believed, however, that the equity to enjoin the breach of a negative condition is confined to cases in which the grantor's deed containing the restriction on the land conveyed creates a servitude, or right in the nature of an easement, which, by implication, is made appurtenant to the land which he retains. Though the grantor has no other land, the condition would not on that account be unlawful, and might be enforced by forfeiture; and if so, the reasoning of Judge Cooley in *Watrous v. Allen*, *supra*, would suggest that equity would grant the milder remedy by injunction. See *Gray v. Blanchard*, 8 Pick (283), (290); *Cowell v. Springs Co.* 100 U. S. 55; and cases cited in note to § 266, *supra*.

As to the persons by and against whom building restrictions are enforceable, see § 262, *supra*, note. As to covenants running with the land, see extended note to *Geizler v. De Graaf* (N. Y.), 82 Am. St. Rep. 664-690.

§ 281. Breach of Condition Subsequent—Equity Will Not Enforce Forfeiture.—In 1 Pomeroy's Equity (2d ed.), § 459, the law is thus laid down: "It is well settled and familiar

doctrine that a court of equity will not interfere on behalf of the party entitled thereto and enforce a forfeiture, but will leave him to his legal remedies, if any, even though the case might be one in which no equitable relief would be given to the defaulting party against the forfeiture." And see, to the same effect, 2 Wh. & T. L. C. Eq. (4th ed.), 2048; 2 Story, Eq. Jur. §§ 1319, 1494; Story, Eq. Pl. §§ 521, 575.¹

¹ FORFEITURE NOT ENFORCED IN EQUITY.—The doctrine that equity will not enforce a forfeiture is laid down above by Pomeroy in unqualified terms; indeed he expressly declares (§ 460): "There are no exceptions to this doctrine; those which appear to be exceptions are not so in reality." On the other hand it has been suggested that equity will enforce a forfeiture "under extraordinary circumstances" (*Livingston v. Tompkins*, 4 Johns. Ch. 415); "in extreme cases" (*Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638); "when exclusively essential to do justice" (8 Am. & Eng. Ency. Law (1st ed.) 446). In 12 Am. St. Rep. 819, note, it is said of such conditions: "They are rarely enforced in equity so as to divest an estate for a breach"; and in Bispham's Equity (6th ed.) § 181, it is said: "In some cases, however, the enforcement of a forfeiture may be regarded in equity with favor."

The case relied on by Bispham and the Encyclopedia (*ubi supra*), as authority for the statement that equity may sometimes enforce a forfeiture, is *Brown v. Vandergrift*, 80 Pa. St. 142, where the doctrine is laid down as follows: "In a case like this [lease of undeveloped oil land] equity follows the law, and will enforce the covenant of forfeiture as essential to justice. It is true, as a general statement, that equity abhors a forfeiture, but this is when it works a loss that is contrary to equity; not when it works equity, and protects the landowner against the indifference and laches of the lessee, and prevents a mischief, as in the case of such leases." And see *Munroe v. Armstrong*, 96 Pa. St. 307, to the same effect. For discussion of the subject, see Bryan, *Law of Petroleum and Natural Gas*, §§ 171-2.

The doctrine of *Brown v. Vandergrift* is expressly confined to oil-leases (so-called) intended to enable the lessee to search for oil under the lessor's land, but "with a clause of forfeiture to compel performance, and put an end to the lease in case of injurious delay or want of success"; and the court declares that it does not extend to leases "for the cultivation of the soil, or for the removal of fixed minerals." Such minerals are distinguished

The general doctrine stated above is firmly established, but it will be useful to give some illustrations of its application.

In *Oil Creek, &c., R. Co. v. Atlantic, &c., R. Co.* 57 Pa.

from petroleum, "whose fugitive and wandering existence within the limits of a particular tract is uncertain; and assumes certainty only by actual development founded upon experiments." It should be added that in this case the lessee was to pay one-eighth of the oil found as a rent or royalty. For the importance of a right on the part of the lessor to terminate such a lease for the lessee's default, see *Downing v. Rademacher*, 133 Cal. 220 (85 Am. St. Rep. 160).

In *Laurel Creek, &c., Co. v. Browning*, 99 Va. 528, a mining lease was made under which the lessee was to pay royalties, and on breach of certain conditions as to a right of way for a railroad, and the mining and shipping of coal, the contract was "to be void at the option of the lessor." On breach of these conditions, a bill was filed in equity, praying that the lease be declared null and void, and for partition of the land among those entitled. This relief was granted by the Circuit Court, and in affirming the decree, the Court of Appeals said:

"The general doctrine is admitted that equity does not favor penalties and forfeitures, and will not ordinarily lend its active aid to enforce them, but will leave the parties to pursue their legal remedies. Nevertheless, in this State, the rule is well established that when a court of equity acquires jurisdiction of a cause for any purpose, it will retain it, and do complete justice between the parties, enforcing if necessary legal rights, and applying legal remedies to accomplish that end. Especially is this true of suits for partition, where, by express provision of the statute, a court of equity may take cognizance of all questions of law affecting the legal title that may arise in the preceding Code of Va. § 2562."

In direct opposition to the doctrine of *Laurel Creek, &c., Co. v. Browning*, *supra*, stands the earlier case of *Craig v. Hukill*, 37 W. Va. 520 (16 S. E. 363). The facts were almost identical with those of the Virginia case, except that the lease was for the purpose of drilling for petroleum oil, instead of for mining coal. The bill prayed, as in the Virginia case, for partition; and there is a statute in West Virginia, identical in effect with that of Virginia, enabling a court of equity in a suit for partition to take cognizance of all questions of law affecting the legal title. Code W. Va. Ch. 79 § 1; *Moore v. Harper*, 27 W. Va. 362. It was held

St. 65, a contract of lease of a railroad declared that a violation of, or failure to perform, any of its stipulations should operate as a forfeiture of the lease, and a bill was filed in

(without referring to the statute) that the court had no jurisdiction to enforce a forfeiture in the partition suit, and the bill was dismissed, without prejudice, however, to the complainant's right to enforce the forfeiture at law. The court said (Brannon, J., delivering the opinion):

"The estate under the Kennedy lease certainly vested, and the plaintiff seeks by a suit in equity to divest it, which he can only do by declaring and enforcing the forfeiture of that lease; for the plaintiff's right must depend for its birth and existence on that forfeiture. . . . Though equity has jurisdiction in partition, it will not exercise it when it can be done only by enforcing a forfeiture."

But whatever view may be taken of the Virginia doctrine that when equity has jurisdiction of a cause for another purpose (and especially, under the statute, for partition), it will enforce a forfeiture if necessary to do complete justice, it would seem that the relief afforded in *Laurel Creek Co. v. Browning*, *supra*, was by way of rescission and not by way of forfeiture. For the decree affirmed not only declared the lease at an end and void, but made provision for ascertaining the value of the improvements on the property, and restored the parties to their rights as they stood before the lease was made.

It may also be noted that the principle laid down by the court in *Laurel Creek Co. v. Browning* is broad enough to justify the rescission of the lease without reference to forfeiture for breach of a condition subsequent. The court says (p. 535): "When a contract has failed of its purpose by the default of one of the parties, occasioned by either his inability or unwillingness to comply with its provisions, a court of equity, having acquired jurisdiction of the parties and subject matter, will not hesitate, at the instance and for the relief of a party not in default, to cancel the contract if it stands as a barrier in the way of doing complete justice in the cause." And see *Shenandoah Land, &c., Co. v. Hise*, 92 Va. 238.

As thus stated, it would seem that petroleum and mining leases, even in the absence of a condition subsequent, might be rescinded in equity on the same ground that deeds providing for the support of the grantor are rescinded on the default of the grantee, viz., that there is no other adequate remedy. (See as to this, note to

equity alleging a breach, and praying (among other things) for a declaration of forfeiture; for an injunction to prevent the defendants from resisting the complainants' re-entry; and for cancellation of the contract. The bill was dismissed with costs, the court (Sharswood, J.) declaring that courts of equity never lend their assistance to the enforcement of a forfeiture, but leave the party to his legal remedies.

In *Mills v. Evansville Seminary*, a case that came three times before the Supreme Court of Wisconsin, it was held (47 Wis. 354; 2 N. W. 550) that equity will not reform a deed absolute in terms by adding a condition subsequent, and then decree a forfeiture for its breach; nor will equity reform such deed by adding a condition in order that the party who thus appears to be entitled to a forfeiture on its breach may enforce such forfeiture at law. 52 Wis. 669 (9 N. W. 925.) For the final disposition of the case in favor of the defendants, on the ground that the condition (established at law by secondary evidence of the contents of a lost title-bond) had not been broken, see 58 Wis. 135 (15 N. W. 133).

In *McKim v. White Hall Co.* 2 Md. Ch. 510, a mortgage had been given to secure the sum of \$6,000, as a forfeiture by the mortgagor for breach of contract, and a court of equity declined to enforce the mortgage by a decree for sale. The judge said: "I cannot bring myself to think that the power of this court can be successfully invoked in this case because of the execution of the mortgage. The circumstance does not take away from the claim the character of a forfeiture,

§ 281, *infra*, on p. 399.) And though there be a condition subsequent, equity would not need to enforce a forfeiture in order to rescind, but would refuse to do so, preferring to grant rescission without forfeiture, in order to place the parties *in statu quo*, which is not done in case of forfeiture.

For other cases on the subject of this note, see *Soper v. Guernsey*, 71 Pa. St. 219; *McClellan v. Coffin*, 93 Ind. 460; *Leonard v. Smith*, 80 Ia. 194 (45 N. W. 762); *Drown v. Ingels*, 3 Wash. 424 (28 Pac. 759).

against the enforcement of which the court always turns its face.”

In *Birmingham v. Lesan*, 77 Me. 494 (1 Atl. 151), a bill in equity was filed after breach of a condition subsequent in a support deed, but before entry by the grantor, to quiet his title, and the bill was dismissed on the ground that this would be a declaration of forfeiture in his favor, and a court of equity does not lend its aid to divest an estate for breach of condition subsequent. Afterwards the grantor made an entry for breach of the condition, and the court said that he might now maintain a bill to remove a cloud from his title (by cancellation of a mortgage) since he had already vested the title in himself by such entry, and was in possession of the land. And see, to the same effect, *Richter v. Richter*, 111 Ind. 456 (12 N. E. 698); *Glocke v. Glocke*, 89 N. W. 119 (§ 261, *supra*, at end of note); *Maginnis v. Knickerbocker Ice Co.* 88 Wis. 300.¹

¹ RESCISSION OF SUPPORT DEEDS.—As to the rescission in equity of support-deeds because of the inadequacy of the remedy at law, see *Lowman v. Crawford*, 99 Va. 688, referred to in note to § 261, *supra*. And see in accord *Jenkins v. Jenkins*, 3 T. Mon. (Ky.) 327; *Scott v. Scott*, 3 B. Mon. (Ky.) 2; *Wilfong v. Johnson*, 41 W. Va. 283 (23 S. E. 730). For the doctrine in Wisconsin by which a covenant of support is treated as a condition subsequent, and the grantor's title, after his entry on the land, is quieted in equity, see *Glocke v. Glocke*, 89 N. W. 119, explained in note to § 261, *supra*.

When the failure of the grantee to render the support is wilful, the law of Illinois is thus laid down in *Cooper v. Gum*, 132 Ill. 471 (39 N. E. 267): “It is well settled in this State that where one has conveyed the property to another in consideration of the support and maintenance of the grantor during his or her natural life, and the grantee refuses to perform his or her agreement, a court of equity will grant relief by rescinding the contract and cancelling the deed.” And it is added: “If the rescission of the contract cannot be referred to any other head of equity jurisdiction, it would be proper to presume that it was made in the first instance with fraudulent intent.”

In *Leach v. Leach*, 4 Ind. 628 (58 Am. Dec. 642), a case of support-deed, the court said: “The defendant held the land

The law is thus tersely stated in *Fitzhugh v. Maxwell*, 34 Mich. 138 (*per* Campbell, J.): "A court of equity has no jurisdiction to enforce forfeitures. If a party desires such relief, he must seek it at law [by action of ejectment, *e. g.*]

upon a condition subsequent that he would in all things substantially comply with his covenant. In such a case a failure to perform the obligation is a breach of the condition subsequent and a forfeiture of the estate, and forms a proper subject for the interference of a court of chancery. An examination of the decree, however, shows that the relief was by way of rescission.

In *Richter v. Richter*, 111 Ind. 456 (12 N. E. 698), also a case of support-deed, there was no enforcement by equity of a forfeiture, for the grantor was already in possession. See § 281, above. The court said: "The grantor having continued in possession after condition broken by the grantee, this was equivalent to re-entry for breach of condition. Having remained in possession, and made formal and unequivocal demand for a reconveyance on the ground that the grantee had failed to perform the conditions on which the deed was executed, nothing further was necessary in order to entitle him to maintain an action [in equity] to quiet his title." See § 277, note on p. 380.

As to the *policy* of support-deeds, Judge Sharswood says in *Soper v. Guernsey*, 71 Pa. St. 219, 223: "It is not an uncommon arrangement for a father to make a conveyance of his farm to one of his sons in consideration of being supported, nursed, and attended during his life. The wisdom of such a contract is very questionable, even where the most entire confidence is felt at the time in the affection of the child. The son of Sirach pronounces emphatically against it: 'Give not thy son and wife, thy brother and friend, power over thee while thou livest; and give not thy goods to another, lest it repent thee, and thou entreat for them again. As long as thou livest, and hast breath in thee, give not thyself over to any. Far better it is that thy children should seek to thee than that thou shouldst stand to their courtesy. In all thy works keep to thyself the pre-eminence; leave not a stain in thine honor. At the time when thou shalt end thy days and finish thy life, distribute thine inheritance.' Ecclesiasticus, xxxiii. 19-23."

As to remedy, in case of a support-deed, on the grantee's default, the learned judge adds: "It is not always easy to administer justice in such cases in conformity to law. The natural feeling of right prompts to the rule which would hold the child

or by entry for breach of conditions. See *Horsburg v. Baker*, 1 Pet. 232; *Marshall v. Vicksburg*, 15 Wall. 148; *Livingston v. Tompkins*, 4 Johns. Ch. 415 (8 Am. Dec. 598); *Bolling v. Mayor, &c., of Petersburg*, 8 Leigh (Va.) 224, 237; *City of Marshalltown v. Forney*, 61 Ia. 578 (16 N. W. 740); *Bonniwell v. Madison*, 107 Ia. 85 (77 N. W. 530); *Watrous v. Allen*, 57 Mich. 362 (58 Am. Rep. 363); *Keller v. Lewis*, 53 Cal. 114; *McCormick v. Rossi*, 70 Cal. 474 (15 Pac. 35); *Raley v. Umatilla County*, 15 Or. 172 (3 Am. St. Rep. 142, 151); note to *Ladd v. City of Boston*, 21 Am. Rep. 485.

to the strict performance of his contract, and give to the parent the right to recall the gift if he fails. Yet it is not always possible to apply such a rule. The deed may want the essential words to make a condition. A condition in a conveyance may be enforced by ejectment, but a consideration, even amounting to a covenant on the part of the vendor, cannot. *Cook v. Trimble*, 9 Watts, 15; *Garner v. McNulty*, 3 Wright, 473; *Perry v. Scott*, 1 P. F. Smith, 119." That ejectment will not lie for breach of covenant, see also *King v. Norfolk, &c., R. Co.*, 99 Va. 625.

It would seem, however, that in case of support-deeds a court of equity will usually find a way to administer the relief declared appropriate by Judge Sharswood, viz., by allowing the grantor to recall his gift for the default of the grantee. See cases cited in § 281, above, and in § 261, *supra*, n. 1, where the language of the Wisconsin court in *Glocke v. Glocke*, 89 N. W. 118, is quoted as follows: "Such contracts [*i. e.*, support-deeds] have come to be looked upon as almost, if not quite improvident in their inception, and in this view courts of equity have gone to great lengths to remedy the mischief." In that case this was done by treating a covenant as a condition subsequent. In *Lowman v. Crouch*, 99 Va. 688, the court refused to do this, but granted rescission of the conveyance by reason of the grantee's breach of covenant. In *Cooper v. Gum*, *supra*, the Illinois court granted rescission on the ground that the refusal of the grantee to render the support promised justified a presumption that the contract was made by him in the first instance with fraudulent intent. With these doctrines to choose from, a court of equity would no doubt ordinarily grant the measure of relief deemed just by Judge Sharswood, and the grantor would recover his property on the grantee's failure to render the stipulated support.

§ 282. Breach of Condition Subsequent—Equity Will Sometimes Relieve Against Forfeiture Therefor.¹—It is not proposed to enter at large on the subject of relief in equity against penalties and forfeitures. For extended discussion, see 2 Wh. & T. Lead. Cas. in Eq. (4th ed.), (1802); 2 Story, Eq. Jur. § 1301; 1 Pom. Eq. § 432; 2 Min. Ins. (4th ed.), 298; and note to *Smith v. Marriner* (Wis.), 68 Am. Dec. 85.

For clearness of view, four cases may be put, the first two being penalties, and the last two forfeitures. The difference

¹ CONDITION PRECEDENT—WILL EQUITY RELIEVE AGAINST?—In *Davis v. Gray*, 16 Wall. 203, the law is thus stated (p. 229): "There is a wide distinction between a condition precedent, where no title has vested and none is to vest until the condition is performed, and a condition subsequent operating by way of defeasance. In the former case equity can give no relief. The failure to perform is an inevitable bar. No right can ever vest. The result is very different where the condition is subsequent. There equity will interpose, and relieve against the forfeiture upon the principle of compensation, where that principle can be applied, giving damages, if damages should be given, and the proper amount can be ascertained."

This emphatic statement of the law seems clearly right on principle. When there has been a failure to perform a condition precedent, there is no question of forfeiture at all. The most that can be said is that a grantee on such condition had a chance to gain an estate, and has lost this chance by non-performance. To relieve against this loss, and vest the estate without performance, is to *create* the estate in the grantee, and this without a compliance with the terms imposed by the grantor. This, it would seem, is beyond the power even of a court of equity.

The authorities, however, on this question are in conflict. See 2 Story Eq. Jur. § 1315, and note collecting the old authorities; 1 Pom. Eq. § 455; 2 Wh. & T. Lead. Cas. in Eq. 2047; 2 Min. Ins. (4th ed.) 299; 1 Lom. Dig. 357; note to *Wells v. Smith*, 31 Am. Dec. 278; note to *Smith v. Marriner* (Wis.) 68 Am. Dec. 87, 88; note to *Burdis v. Burdis* (Va.) 70 Am. St. Rep. 829-830.

The cases in Virginia seem to favor the doctrine that a court of equity, when compensation can be made, may relieve against failure to perform a condition precedent. See *Columbia College v. Clopton*, 7 Gratt. 168; *Keffer v. Grayson*, 76 Va. 517; *Selden v. Camp*, 95 Va. 527; *Grubb v. Burford*, 98 Va. 553.

is that when on the promisor's default, whether in the payment of money or in the doing of some collateral act, a *sum of money is to be paid by him* (larger, when the default is in payment of money, than the sum not paid with lawful interest), this sum of money is in the nature of a penalty. On the other hand, when for the non-payment of money, or the failure to do a collateral act, *the promisor is to incur a liability to lose his property*, real or personal, such liability, if enforced, is by way of forfeiture. 1 Pom. Eq. § 436.

Bearing this distinction in mind, the four cases may be thus stated:

1. A promises to pay B \$100, on a day named, and on A's default, A's liability to B is to be increased, and to become \$200.

2. A promises to make certain improvements on land leased to him by B; and on A's default, A is to become liable to pay B \$200.

3. A promises to pay B \$100 on a day named as rent for land leased to him by B; and on A's default, A is to become liable to lose the lease.

4. A promises to make certain improvements on land leased to him by B; and on A's default, A is to become liable to lose the lease.

Referring to the distinction stated above, it will be seen that (1) and (2) are penalties, while (3) and (4) are forfeitures. Under (3) and (4), the forfeitures provided for on default are clearly for the breach of a condition subsequent; and under (1) and (2) the same character was given to the penalties by the usual form of obligation—A acknowledging himself in each case to be bound to B for the payment of \$200, (the penalty) to be discharged, however, in the one case by A's punctual payment of \$100 (the real debt), and in the other by A's faithful performance of his promise to make the improvements. See *Leary v. Laflin*; 101 Mass. 334.

Assuming now that A makes default, will equity relieve him from the payment of the money by way of penalty, or

from the forfeiture of the lease? And, if so, on what terms? To answer these questions, penalties and forfeitures must be considered separately.

I. *Penalties* (1 and 2, *supra*). "The equity for relief against the enforcement of penalties," says Adams (*Equity*, 108), "originates in the rule which formerly prevailed at law, that on breach of contract secured by penalty, the full penalty might be enforced without regard to the damage sustained." But in the view of a court of equity, the purpose of B, in the above cases, in imposing a penalty on A, is to *secure the performance of A's promise*, and not to speculate on the possibility of non-performance, in the hope of securing a greater benefit by way of penalty. Hence, when A is in default, equity will relieve against the penalty (which the common law exacts), if the case be such that the damages can be ascertained, and adequate compensation can be made to B for A's default.

In the language of Lord Macclesfield: "It is the recompense that gives this court [equity] a handle to grant relief." *Peachy v. Duke of Somerset*, 1 Strange, 447. Such recompense in damages is deemed to be in accordance with the original intent of both parties; and the party seeking to enforce the penalty receives, in lieu thereof, all that he ought to expect or demand. 2 Min. Ins. (4th ed.), 298; *Clark v. Barnard*, 108 U. S. 436, 455.

Applying this principle to the first case of penalty stated above, where the payment *ad diem* of a sum of money is secured by a promise to pay a larger sum in the event that the debtor makes default, equity, if the penalty be incurred, will relieve against it as a matter of course; for it is considered that mere delay in the payment of money is adequately compensated by the payment of the real debt, together with interest and costs. And this doctrine of equity was made the rule of law in England by the statute of 4 Anne, c. 16, § 13, re-enacted in Virginia at an early day, and now found in the Code, § 3393, as follows: "When there is a recovery on a bond with condition for the payment of money, the judgment

shall be for the penalty of the bond, to be discharged by the payment of the principal and the interest due thereon."

As to the second case, where the penalty is to secure the doing or not doing of some collateral act, the law is laid down by both Story and Pomeroy that equity will only grant relief against a penalty on condition that adequate compensation can be made; and Story states expressly that if it cannot be made equity will not interfere. 2 Story Eq. Jur. § 1314; 1 Pom. Eq. § 433. It is believed, however, that the doctrine of penalties is here superseded by that of liquidated damages; and that equity does not refuse to relieve against a *true penalty* because of the difficulty of assessing compensatory damages, but rather on that ground declines to regard the sum agreed on as a penalty at all, thus leaving it to be enforced according to the stipulation of the parties.

For full discussion of the law of liquidated damages—an anticipatory agreement at the time of making a contract, involving uncertain damages on breach, as to the amount of recovery in case of default, the law thus allowing the parties to make a conjectural estimate of damages in advance instead of leaving it to the guess of a jury—see note to *Graham v. Beckham*, 1 Am. Dec. 331; 1 Pom. Eq. §§ 440-447.¹

¹ PENALTY FOR NON-PERFORMANCE OF COLLATERAL ACT.—The doctrine of the text that in this case equity will always relieve on the payment of damages seems to be confirmed by the statutes, in England and Virginia providing for relief at law, which declare that in every case of a penalty a judgment therefor shall be discharged by the payment of the actual damages. See 8 & 9 Will. 3, c. 11, § 8; Code Va. § 3394. For full explanation of the English statute, see note to *Gainsford v. Griffith*, 1 Saund. Rep. 58.

The Virginia statute (after other matter not relevant to the present point) reads as follows: "In any other action for a penalty for the non-performance of any condition, covenant, or agreement, the plaintiff may assign as many breaches as he may think fit, and shall in his declaration or *scire facias* assign the specific breaches for which the action is brought or the *scire facias* sued out. The jury impaneled in any such action shall ascertain the damages sustained, or the sum due, by reason of the breaches

II. *Forfeitures* (3 and 4, *supra*). In the case under (3) above, when the tenant is *in default in the payment of rent*,

assigned, and judgment shall be entered for the penalty, to be discharged by the payment of what is so ascertained, and such further sums as may be afterwards assessed, or be found due upon a *scire facias* assigning a further breach. Such *scire facias* may be sued out from time to time, by any person injured, against the defendant or his personal representative; and for what may be assessed or found due on the new breach or breaches assigned, execution may be awarded." It will be observed that the statute embraces official bonds given by sheriffs and others, and provides that the judgment once given for the penalty in an action for a breach shall stand as a reservoir of damages to satisfy demands by the plaintiff or others for further defaults in official duty.

As to the suggestion above that when equity declines to relieve against a penalty, so-called, it is because the sum agreed on is considered to be not a penalty but liquidated damages, see note to *Gainsford v. Griffith*, *supra*, where it is said (p. 58 c): "Whenever the sum mentioned in any instrument must, from the express language of the instrument, or from necessary implication, be considered as the ascertained or liquidated damages agreed to be paid by one party to the other on the happening of a particular event, or the performance or omission of a particular act, the statute (8 & 9 Will. 3, c. 11, § 8, referred to *supra*) will not apply; for in such case the sum is not a penal sum; and courts of equity will not relieve against such sum, though they will against a penalty."

Three cases may be cited (out of many) where a sum to be paid on the promisor's default has been construed, by reason of the difficulty of estimating the loss flowing from a breach, to be liquidated damages to be enforced, and not a penalty to be relieved against. These are (1) *Keeble v. Keeble*, 85 Ala. 552, 5 So. 149 (promise by a business manager to wholly abstain from intoxicating liquors, and to continue and remain sober, and in the event of intoxication to pay \$1000); (2) *Ward v. Hudson River, &c., Co.*, 125 N. Y. 230 (promise by a building contractor to erect houses by a certain date, and in case of default to pay \$1540); (3) *Leary v. Lafin*, 101 Mass. 334 (promise by the lessee of a livery stable to conduct it in a manner as satisfactory to all reasonable parties as the lessor had done, and at the end of the term to surrender it "in as good repute and run of custom as now thereto pertain," and on default to pay \$1000).

In *Leary v. Lafin*, *supra*, the Court says: "From the nature

it is well settled that equity will relieve against the forfeiture on the subsequent payment of the rent, with interest and costs. And in this case also, relief may now by statute be afforded at law. See for the English statutes, Williams on Real Prop. (17th ed.), 389. For the Virginia statutes, see § 59 *supra*; 2 Min. Ins. (4th ed.), 277, 300.

When, however, a forfeiture has accrued under (4) above, by the reason of the *doing or not doing of some collateral act* (other than the payment of rent), the rule is that equity affords no relief unless such act be in substance the payment of money, so as to be assimilated to the payment of rent, and this through equity would relieve upon payment of the actual damages if the case were one of penalty and not forfeiture. It is settled, therefore, that equity does not always regard a forfeiture (as it does a penalty) as mere security for the doing of collateral acts: but, except under (3) above, it allows a party entitled at law to a forfeiture to enforce it, instead of compelling him to accept in lieu thereof damages to be assessed by a jury. 1 Pom. Eq. § 450.

Thus if there be a breach of a lawful condition in re-

of the case, the actual damages resulting from a breach of this agreement are not capable of being ascertained by any satisfactory and known rule; and it was manifestly the intention, as it was clearly within the power, of the parties not to leave them to the uncertain estimate of a jury, but to fix them by express agreement."

And in *Keeble v. Keeble*, *supra*, it is said by Somerville, J.: "One may sell out the good will of his business in a given locality, and agree to abstain from its further prosecution, or, in the event of the breach of his agreement, to pay a certain sum as liquidated damages; as, for example, not to run a steamboat on a certain river or to carry on the hotel business in a particular town, not to re-establish a newspaper for a given period, or to carry on a particular branch of business within a certain distance from a named city. In all such cases, as often decided, it is competent for the parties to stipulate for a gross sum by way of liquidated damages for the violation of the agreement, and for the very reason that such damages are uncertain, fluctuating, and incapable of easy ascertainment."

straint of alienation or marriage, the violation of a condition restraining the sale of liquor on certain premises, a failure to construct culverts as required by a condition subsequent, the violation of a building restriction in the nature of a condition, equity will not relieve against the forfeiture which may be thereby incurred. And in case of a tenant, equity will not relieve against a forfeiture incurred by him by failure to repair, failure to insure, for breach of a covenant not to assign without license, or for the doing or not doing of any specific act damages for whose breach would have to be assessed by a jury. See 2 Story Eq. Jur. § 1323; 1 Pom. Eq. § 454; 2 Wh. & T. L. C. in Eq. (1102); *Grigg v. Landis*, 19 N. J. Eq. 350, s. c. 21 Id. 514; *Maginnis v. Knickerbocker Ice Co.* (Wis.), 88 N. W. 300.

In *Klein v. Ins. Co.* 104 U. S. 88, it is held that a condition in a policy of life insurance, that if the stipulated premium be not paid on or before a certain day the policy shall cease and determine, is of the very essence and substance of the contract, and that a court of equity cannot relieve against a forfeiture caused by failure so to pay. The court said: "No compensation can be made to a life insurance company for the general lack of punctuality on the part of its patrons." See 1 Pom. Eq. § 456, n. 2.

§ 283. Breach of Condition Subsequent—Waiver of Forfeiture.—This subject has already been referred to incidentally (§ 277, *supra*), and it has been seen that, since the mere breach of a condition subsequent does not of itself cause forfeiture, the grantor may waive the enforcement of the right to forfeit; and, when this is once done, the title of the grantee, notwithstanding his breach of the condition, is no longer forfeitable therefor. Thus in *Preston v. Bosworth*, 153 Ind. 458 (74 Am. St. Rep. 313), it is held that a complaint in an action to recover an estate claimed to have been forfeited for breach of a condition subsequent by a grantee in possession is demurrable when it alleges only the *breach* of the condition, but does not state that any steps were taken

to enforce the forfeiture. The court says: "A breach of the condition subsequent is pleaded. But a breach does not complete a forfeiture. A breach may be waived, and is not, therefore, self-operative to divest the grantee's title. If not waived, a breach may be made the occasion of re-entry and enforcement of forfeiture. A complaint must exhibit a complete right of action." For a discussion of waiver of forfeiture, see note to *Cross v. Carson* (Ind.) 44 Am. Dec. 746; 1 Pom. Eq. § 451, n. 1; note to *Dumpor's Case*, 1 Smith, Lead. Cas. (7th ed.) 95; Taylor, L. & T. § 497.

With reference to the *mode* of waiver, it is said in *Sharon Iron Co. v. City of Erie*, 41 Pa. St. 341, 351: "The doctrine that a forfeiture may be waived by the party who has the right to avail himself of the breach of a condition, and that he may do this by acts as well as by express agreement, is a familiar one." Indeed, the law favors the waiver of a forfeiture; and such waiver is readily implied from any conduct on the part of the grantor on condition inconsistent with an intention to enforce a forfeiture for its breach, and especially when his acts, whether of commission or omission, are such as to bring him within the doctrine of estoppel. *Garnhart v. Finney*, 40 Mo. 449 (93 Am. Dec. 303).

As to active conduct which amounts to a waiver of the breach of the condition, the most frequent example is where a lease contains a clause of re-entry for breach of a condition subsequent, and the landlord, knowing that liability to the forfeiture has been incurred (see *Silva v. Campbell*, 84 Cal. 420, 24 Pac. 316), accepts rent as such which has fallen due since the breach of the condition. Thus in *McKildoe v. Darracott*, 13 Grat. 278, a lease was made on condition that the lessor should have right of re-entry if the lessee should underlet the property without the license of the lessor; and the lessor's conduct, with knowledge of a sublease without license, was held to amount to a waiver. The court said: "Each and all of these acts, to-wit: the demand of the rent [of the lessee], the distress for it, the acceptance of it, and

the express declaration made at the time of its payment, were plain and palpable affirmations and recognitions of the existing tenancy of R. F. Darracott [the lessee]. Why, then, are they not a waiver of the forfeiture?"

A similar doctrine is laid down in *Dougal v. Fryer*, 3 Mo. 40, 22 Am. Dec. 458 (waiver of breach of condition, that a deed should be void unless purchase-money be paid by a certain time, by the grantor's accepting payment after that time); and in *Dunklee v. Hooper*, 69 Vt. 65, 37 Atl. 225 (waiver of breach of condition of support by the grantor's return and acceptance of support after having left the premises for eleven weeks for non-support). And see *Deaton v. Taylor*, 90 Va. 219; *Ireland v. Nichols*, 46 N. Y. 413; *Murray v. Harway*, 56 N. Y. 337; *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36 (13 Am. St. Rep. 420); *Jenks v. Palowski*, 98 Mich. 110 (39 Am. St. Rep. 522); *Moses v. Loomis*, 156 Ill. 392 (47 Am. St. Rep. 194, and note p. 197); *Bonniwell v. Madison*, 107 Ia. 85 (77 N. W. 530); *Alexander v. Alexander*, 156 Mo. 413 (57 S. W. 110).¹

¹ CONTINUOUS AND NON-CONTINUOUS CONDITIONS—EFFECT OF WAIVER OF BREACH.—Conditions subsequent in a lease may be either *single*, and capable of but one breach, and that "once for all"; or they may be *continuous* in their nature, so that non-performance constitutes a continuing breach. And under continuing breach, the lessee's default may be uninterrupted; or after one default, another may occur after an interval, constituting a recurring breach.

The importance of the above distinction is with respect to the effect of waiver of a breach. If the waiver be of the breach of a non-continuous condition, the condition itself is wholly discharged. On the other hand, when the condition is continuous, and the breach may be continuing or recurrent, a waiver of a breach which has continued up to a certain time, or of one default, is a waiver only up to that time, or of that default, and is not a waiver of the continuation of the breach, or of a repetition of the default.

As an example of a single condition, which is wholly discharged by a waiver after breach, reference is made to *McGlynn v. Moore*, 25 Cal. 384, where a forfeiture was sought to be enforced for the

As to passive conduct which operates by estoppel as a waiver of a breach of a condition subsequent, see *Ludlow v. New York, &c., R. Co.*, 12 Barb. (N. Y.) 440, where a grant of

lessee's breach of a condition to build a warehouse, as specified in the lease, within two years from its date. The lessor received from the lessee rent accruing subsequent to his breach of the condition; and this was relied on by the lessee as a waiver of the forfeiture. It was claimed by the lessor that the condition was continuous, and that the lessee's continued failure after the two years to build the warehouse was a continuing breach, and that this gave the lessor a new right of entry. But the court held that a condition to build within a given period is non-continuous, and is capable of but a single breach; and that this having been waived by the lessor, his right of re-entry was gone forever.

A good example of a continuous condition, whose breach is continuing, so that the lessor's waiver by receipt of rent after a breach is of the past default only, is found in *Bleecker v. Smith*, 13 Wend. (N. Y.) 530. Here the condition was that the lessee should plant a certain number of apple trees on the demised premises, and should replace those that decayed or were destroyed, so as always to keep up the given number during the term. It was claimed by the lessee, when ejectment was brought to enforce a forfeiture for breach of the condition, that the lessor's receipt of rent after a breach had discharged the condition, so that there could be no subsequent breach. But it was held that the condition was continuous, and that the lessor could enforce a forfeiture for a new breach occurring since his receipt of rent. The court said:

"The lessee was bound during the continuance of his term to preserve the number of apple trees; and the lessor is at liberty at any time to enforce the forfeiture, when a default exists or accrues after the payment of rent. The acceptance of rent waives all forfeiture up to that time. The lessor cannot show any default in the lessee previous to the payment of the rent. For example, rent was paid in 1820; the lessor cannot go back beyond that time to prove a forfeiture. If in 1821 the lessee had planted the trees, he was safe from forfeiture. So also rent was received in 1830; and for the purpose of sustaining this action, the plaintiff cannot prove any violation of the condition before that time." But it was added: "Here is a breach of condition since the payment of rent, since the lessor admitted the lease was in force, and the estate in existence. If the estate exists, it is by force of

land in fee was made to a railroad company on condition subsequent that a railroad should be completed through the land granted by a certain time. This condition was broken. But after the time had elapsed, the grantor, with knowledge of the breach, permitted the company to go on and incur expense in constructing the road, making no objection; and this was held a waiver of the forfeiture. Another example of a

the lease, and the estate thereby created is an estate upon condition. Such estate did exist in 1830, when the last rent was received; but the condition having been subsequently broken, the lessor has a right to enter for the breach, precisely as he might have done for the first breach before he waived his entry by receiving rent. The language of the lessor to the lessee by accepting rent is this: 'I will not enforce the forfeiture against you at present, but continue the lease and estate on the former terms and conditions.'"

For an example of a continuous condition whose breach is recurrent, see the familiar case of a condition in a lease restraining the tenant from subletting. Here the doctrine is that the condition is continuous in that there may be successive sublettings, each of which will be a recurrent ground of forfeiture. But each sublease is a single breach, and the sublessee's occupancy under it does not constitute a continuing breach. Hence, a receipt of rent after the first sublease waives any right of re-entry therefor; but this right of re-entry again becomes operative on a second, or any subsequent, sublease. Thus in *Ireland v. Nichols*, 46 N. Y. 413, 417, it is said: "When the plaintiff waived this right [of entry by reason of the sublease] by receipt of rent [from the lessee], the right founded upon this subletting, or the occupancy in pursuance thereof, was gone. It is true that the condition not to sublet was continuous; and had Nichols [the lessee] made a new contract for subletting any portion of the premises, a forfeiture would thereby have been incurred, which the plaintiff [lessor] would have been at liberty to enforce. But no such new contract has been made. The case expressly shows that the possession of the subtenants was in pursuance of the contract made in May. The forfeiture incurred by this contract having been waived by the plaintiff was not revived by the subsequent possession of the subtenants in pursuance thereof." And see, in accord, *McKildoe v. Darracott*, 13 Gratt. 278, 286.

As to a condition not to assign, it is sometimes distinguished

similar character is found in *Scovill v. McMahon*, 62 Conn. 378 (36 Am. St. Rep. 350), where it is said: "The alleged right to enter for failure to maintain a fence [around a burying ground] accrued about forty-five years ago, as the record shows that the grantees have never built a fence around the premises. During this period of forty-five years there has apparently been no demand made, either by the grantor or his heirs, for the erection of a fence. During this period the grantor and his heirs have silently permitted interments to be made, and monuments to be erected, until this tract was filled with graves. . . . If the clause in question were to be construed as creating a condition subsequent, we think upon these facts the plaintiffs may be justly held either to have waived their right, or to have lost it by their own laches." And see *Kenner v. American Contract Co.*, 9 Bush. (Ky.), 202; *Grigg v. Landis*, 21 N. J. Eq. 449; *Barrie v. Smith*, 47 Mich. 130 (10 N. W. 168).

It is said, however, in *Gray v. Blanchard*, 8 Pick. (Mass.) 290, that "a mere indulgence is never to be construed into a waiver of a breach of condition." And in *Royal v. The Aultman Taylor Co.*, 116 Ind. 424 (2 L. R. A. 526), the law is thus stated: "While a condition may be waived by the party who has a right to avail himself of it, mere indulgence, or silent acquiescence in the failure to perform, is never construed into a waiver unless some element of estoppel can be

from a condition not to sublet, on the ground that in the former case the condition is single, and capable of but one breach, whereas in the latter it is continuous. See *Conger v. Duryee*, 90 N. Y. 594, 599; *McGlynn v. Moore*, 25 Cal. 384, 395. For discussion of this subject, see p. 428, *infra*, note.

On the whole subject of waiver of continuous and non-continuous conditions, see (in addition to the above cases) *Doe v. Woodbridge*, 9 B. & C. 376; *Doe v. Pritchard*, 9 B. & Ad. 765; *Doe v. Rees*, 4 Bing. N. C. 384; *Doe v. Gladwin*, 6 Ad. & E. 953; *Doe v. Jones*, 5 Exch. 498; *Jackson v. Allen*, 3 Cow. (N. Y.) 220; *Crocker v. Old South Society*, 106 Mass. 489; *Alexander v. Hodges*, 41 Mich. 692 (3 N. W. 187). And see 1 Tayl. L. & T. § 287; 2 Id, §§ 500, 501; 1 Washb. Real Prop. (323); 1 Sm. Lead. Cas. 104, 114.

invoked." And see to the same effect *McKildoe v. Darracott*; 13 Gratt. 278, 282; note to *Cross v. Carson* (Ind.), 44 Am. Dec. 246; 6 Am. & Eng. Ency. Law (2d ed.), 508, and note; *Perry v. Davis*, 3 C. B. (N. S.), 769. While this may be true of "mere indulgence" for a time short of the time prescribed as a bar to an entry by the statute of limitations (see in Virginia Code, § 2915), yet it is believed that the case would be rare in which a failure to exercise the right to enforce forfeiture for a considerable period would not be accompanied by such conduct on the part of the grantor on condition (at least when the grantee is in possession) as to bring him within the operation of the doctrine of laches and estoppel, and so amount to a waiver of the breach. See *Jones v. McLain*, 16 Texas Civ. App. 305 (41 S. W. 714).

§ 284. Discharge of Condition Subsequent—Doctrine of Dumpor's Case.—Under discharge of a condition subsequent must be considered the modes in which an estate on such condition may become absolute and unconditional, the condition itself being forever extinguished and destroyed. This may occur by waiver after breach (as has been stated in note on page 410, *supra*), when the condition imposes a single obligation, whose breach cannot be continuing or recurrent. In this case the condition itself is discharged by the lessor's waiver; though it is otherwise when the condition is continuous. Or a condition may be discharged before breach, and this either by the intention of the parties, or by conduct of the grantor which the law pronounces an extinguishment of the condition, though no such result was intended.¹

¹ **DESTRUCTION OF A POSSIBILITY OF REVERTER BY ATTEMPTED ASSIGNMENT.**—Where it is held that a mere possibility of reverter is non-assignable by the grantor (as to which see § 275, *supra*), the doctrine is that if the grantor attempts to alien it he thereby destroys it. As is said in *Rice v. Boston, &c., R. Co.*, 12 Allen (Mass.) 141, 143: "The original maker of the condition cannot enforce it after he has parted with his right of reverter; nor can his alienee take advantage of a breach, because the right was not assignable." And in this case it was held that the doctrine was

Under the first head—condition extinguished by intention—comes the *performance* of a condition, as when an affirmative condition is duly satisfied by the payment of money or the doing of some collateral act. So a negative condition may cease to be operative by the grantee's refraining from doing the forbidden act during the period prescribed. The effect of

not affected by the fact that the attempted alienation was to the son of the grantor, who upon his death became his heir, and then brought an action to enforce a forfeiture for a breach occurring after his father's death. It was held that the son could not recover: "not as heir because he did not inherit that which his father had conveyed in his lifetime; nor as a purchaser because his deed was void."

This harsh doctrine by which a deed which is void, and conveys nothing to the assignee, operates, nevertheless, to extinguish the right of the grantor—an attempted assignment enuring to the benefit of the grantee on condition, whose estate thus becomes absolute—is well sustained by authority. See 1 Shepp. Touch. 158; 2 Washb. Real Prop. 19; note to *Cross v. Carson* (Ind.) 44 Am. Dec. 747; *Underhill v. Saratoga, &c., R. Co.*, 20 Barb. (N. Y.) 455; *Hooper v. Cummings*, 45 Me. 359; *Stearns v. Harris*, 8 Allen (Mass.) 597; *Merritt v. Harris*, 102 Mass. 326. Like the rule in *Dumpor's Case* (§ 284, above), the doctrine was doubtless due to the law's abhorrence of forfeitures, and consequent readiness to seize on any pretext to prevent them. In *Rice v. Boston, &c., R. Co.*, *supra*, the doctrine is defended on the grounds of estoppel and public policy.

In *Uppington v. Corrigan*, 151 N. Y. 143, where an attempted devise was made of a possibility of reverter to a third person (as to which see § 276, *supra*), it was nevertheless held, that the heir-at-law could enforce a forfeiture for breach of the condition. The objection that the attempted devise of the possibility of reverter had destroyed it was not raised; and the case is no doubt distinguishable from *Rice v. Boston, &c., R. Co.*, *supra*, on the ground that there the *deed* of the father, though inoperative to convey the possibility of reverter, had extinguished it in the father's lifetime, leaving nothing to descend to his heir; whereas in *Uppington v. Corrigan* the attempted alienation by devise, having no effect whatever in the grantor's lifetime, did not operate to cut off the devolution of the possibility of reverter to the heir, which took place at least *eo instanti* with the abortive attempt to devise. It is possible also that the considerations of public

such performance is thus stated by Blackstone (2 Com. 110): "When any condition is performed, it is thenceforth entirely gone; and the thing to which it was before annexed becomes absolute and wholly unconditional." See 2 Tho. Co. (60), n. (O. 1); note to *Cross v. Carson* (Ind.), 44 Am. Dec. 748. Under this head also comes *release* of a condition. Of this it is said in 1 Sheppard's *Touchstone* (158): "If the feoffor or lessor release to the feoffee or lessee all conditions, or all demands in the land, or confirm the estate of the feoffee without condition, etc., by either of these means the condition is destroyed and gone forever." See as to release of a condition, *Brattle Square Church v. Grant*, 3 Gray (Mass.), 142, 148; *Jewell v. Lee*, 14 Allen (Mass.) 145 (92 Am. Dec. 744); note to *Cross v. Carson* (Ind.), 44 Am. Dec. 746; and p. 370, *supra*, note. As to who is entitled to release a condition, see *Tanner v. Bibber*, 2 Duvall (Ky.), 550; *Hopkins v. Smith*, 162 Mass. 444; *Safe Deposit, &c., Co. v. Flaherty*, 91 Md. 489 (46 Atl. 1009).

Under the second head—condition discharged by the conduct of the grantor, irrespective of his intention—comes the doctrine of *Dumpor's Case*, 4 Co. 119, decided in the King's Bench in 1603. It was there resolved that if the lessor of land, on condition subsequent that he may re-enter if the lessee *or his assigns* shall assign the term without the license of the lessor, once gives such license to the lessee, who assigns accordingly, the condition is thereby discharged; and the assignee takes the term absolute and unconditioned, so that such assignee, or any subsequent assignee, may assign it without license, just as if no condition to the contrary had ever been imposed. In *Dumpor's Case* the license to the lessee was to assign to anybody he pleased ("to any person or persons

policy and of estoppel, which are dwelt on in *Rice v. Boston, &c., R. Co.*, are not applicable to a devise of a possibility of reverter, so as to deprive a grantor, whose will is inoperative as to such possibility, of the privilege of transmitting it to his heir at law.

For the destruction of a condition subsequent by an attempted apportionment, see p. 420, *infra*, note.

quibuscunque"); but in *Brummell v. McPherson*, 14 Ves. 173 (decided in 1807), Lord Eldon applied the doctrine of *Dumpor's Case*, and denied the lessor's right of re-entry when the assignee had assigned without license, although the lessor's license to the lessee was to assign to the assignee only, and not to whomsoever the lessee pleased.¹

¹ FACTS IN DUMPOR'S CASE—WHO ARE ASSIGNS.—In 4 Co. 119, the facts in *Dumpor's Case* are thus stated: "In trespass between Dumpor and Symms, upon the general issue, the jurors gave a special verdict to this effect: The President and Scholars of the College of Corpus Christi in Oxford, made a lease for [30] years, *anno* 10 Eliz., of the land now in question to one Bolde, *proviso* that the lessee or his assigns should not alien the premises to any person or persons, without the special license of the lessors. And afterwards the lessors by their deed, *anno* 13 Eliz., licensed the lessee to alien or demise the land, or any part of it, to any person or persons *quibuscunque*. And afterwards, *anno* 15 Eliz., the lessee assigned the term to one Tubbe, who by his last will devised [bequeathed] it to his son, and by the same will made his son executor, and died. The son entered generally, and the testator was not indebted to any person, and afterwards the son died intestate, and the ordinary committed administration to one who assigned the term to the defendant [Symms]. The President and Scholars, by warrant of attorney, entered for condition broken, and made a lease to the plaintiff [Dumpor] for 21 years, who entered upon the defendant, who re-entered, upon which re-entry this action of trespass was brought."

From the above statement, it will be seen that there were in all four assignments, viz. (1) that by Bolde to Tubbe, under the lessors' license, (2) that by Tubbe to his son by bequest, (3) that on the son's death to his administrator, and (4) that by the administrator to Symms, the defendant. The case turned on the validity of the second assignment by Tubbe to his son by bequest, which it was assumed would have been in violation of the condition had not the condition been discharged already by the license to Bolde. As for the subsequent assignments, (3) and (4) above, they were not in violation of the condition, the word "assigns" not extending to such cases; but of course the title of Symms depended on the right of Tubbe to bequeath to his son, that bequest being a link in Symms's chain of title.

That an assignment by operation of law is not within the re-

The question in *Dumpor's Case* is stated in Cro. Eliz. 815 (where the case is reported under the name of *Dumper v. Syms*) as follows: "Whether this license to the first lessee to alien (who aliened accordingly) be a dispensation only [*i. e., pro hac vice*], or a total determination of the condition. And as to that point Gawdy, Clinch, and Popham delivered their opinion severally that the condition was gone and discharged by the dispensation to alien [given] to the lessee himself; for the condition, being once dispensed with, it is utterly deter-

straint of a condition not to assign (unless made so expressly) is well settled. This applies to the transfer of the lease by law to the administrator of Tubbe's son (under (3) *supra*); and when an administrator thus receives a term, he is entitled to dispose of it as an asset of the estate (this under (4) *supra*). See 1 Taylor, L. & T. § 408; 2 Id. § 427; 18 Am. & Eng. Ency. Law, 661; *Seers v. Hind*, 1 Ves. Jr. 294. The only unlicensed assignment, then, embraced by the terms of the condition in restraint, was the bequest by Tubbe to his son, who, it seems, was considered to enter as legatee (there being no debts) and not as executor. See as to this the report of *Dumpor's Case* in Cro. Eliz. 816.

That a bequest was forbidden by a condition in a lease against assignment had been expressly held in *Berry v. Taunton*, Cro. Eliz. 331, decided in the King's Bench in 36 Eliz., only a few years before the decision in *Dumpor's Case* by the same court. And this view of a bequest is taken in 7 Am. Law Review, 620, note. On the other hand in 1 Taylor, L. & T. § 408, it is said: "It would seem, also, that a devise [bequest] of a term by the lessee, is not a breach of the covenant not to assign, although the earlier cases hold the contrary." And see 18 Am. & Eng. Ency. Law, 662. It is believed, however in spite of the *dicta* to the contrary in the cases cited by Taylor—*Crusoe v. Bugby*, 3 Wilson, 237, and *Doe v. Bevan*, 3 M. & S. 358—that the better doctrine is that a bequest of a term is such an assignment as the condition restrains. Certainly this was the law of England when *Dumpor's Case* was decided. If it had not been, then the great question of discharge of the condition by the license to the lessee would not have arisen in that case; for none of the assignments after that with license would have been embraced by the condition in the lease not to alien (assign), and there would have been no need to consider the discharge of a condition of which, if in existence, there had been no breach.

mined. For it cannot be discharged for a time, and be *in esse* again afterwards.”¹

In 4 Co. 120, the reasons for the discharge of the condition by the license to the lessee are thus stated: “And although the proviso be that the lessee *or his assigns* shall not alien, yet when the lessors license the lessee to alien, they shall never defeat by force of the said proviso the term which is absolutely aliened by their license, inasmuch as the assignee has the same term which was assigned by their assent; so that if the lessors dispense with one alienation, they thereby dispense with all alienations after; for inasmuch as by force of the lessors’ license, and the lessee’s assignment, the estate and

¹ DOES THE DOCTRINE OF DUMPOR’S CASE EXTEND TO A CONDITION RESTRAINING SUB-LETTING WITHOUT LICENSE.—In *Dumpor’s Case*, the condition was not to “alien” without license, and this was taken to refer to an assignment of the whole term. But it would seem that the reasoning of the court is equally applicable to a condition restraining sub-letting without license if the lessor licenses one sub-lease. It has been suggested, however, that a distinction should be made between an assignment and a sub-lease, on the ground that a sub-lease is susceptible of more than one breach, while an assignment is not. See Woodfall L. & T. (10th ed.) 550, cited in 7 Am. Law Review 633; 1 Sm. L. C. 104.

But it is believed that this distinction is without foundation, and that the rule in *Dumpor’s Case* is, on principle, as much applicable—the license being construed as a discharge of the condition—to a second sub-lease as to a second assignment. It is only when continuing breaches are possible that there is any room for the operation of the rule in *Dumpor’s Case*; and on p. 428, *infra*, note, it is shown that a condition restraining assignment is continuous, *i. e.*, it is capable of recurrent breaches. If this be so, then as there is no difference in this respect between an assignment and a sub-lease, the rule in *Dumpor’s Case* seems equally applicable to both. See 1 Taylor L. & T. § 286, note, where it is said of the doctrine of *Dumpor’s Case*: “It makes no difference whether the condition relates to a single or continuous duty. A license for one breach in the manner contemplated by the lease will discharge the whole condition.” But that a mere *implied waiver* does not have this effect, either as to an assignment or a sub-lease, see p. 428, *infra*, note.

interest of Tubbe [the assignee] was absolute, it is not possible that *his* assignee, who has his estate and interest, shall be subject to the first condition; and as the dispensation of one alienation is the dispensation of all others, so it is as to the persons, for if the lessors dispense with one, all others are at liberty."

From the above reasons, taken from the two reports of *Dumpor's Case*, it is manifest that the decision proceeded on the ground of the *entirety* of a condition, both as to time and persons, in the sense that it must have uninterrupted operation, any impairment of its integrity by licensed dispensation being fatal to its existence. Thus in *Croke* it is said: "It cannot be discharged [*i. e.*, dispensed with] for a time, and be *in esse* again afterwards." And Coke says: "So it is as to the persons; for if the lessors dispense with one [*i. e.*, allow the lessee to assign] all others are at liberty." And he insists that if, by the lessors' license to the lessee to assign, the term once becomes free from the condition, it must forever remain so, and that the condition can never again attach to the term, into whosoever hands it may come. And in both reports, precedents are relied on which declare that a condition subsequent is indivisible and incapable of apportionment, as if this doctrine tended to sustain the decision of the court.¹

¹ NON-APPORTIONMENT OF A CONDITION SUBSEQUENT BY ACT OF THE PARTIES.—In 1 Sheppard's *Touchstone* 159, the law is thus laid down: "If a lease be made for years on condition that the lessee or his assigns shall not alien without the license of the lessor, and the lessor license the lessee alone to alien, or license him to alien a part of the land, or license him to alien all the land for a time; or if the lease be to three on such a condition, and the lessor license one of them to alien, in all these cases the condition is gone forever." And Preston's annotation is: "For a condition once dispensed with, in the whole or in part, is dispensed with forever, and as to all the land; for a condition is entire, and cannot be apportioned except by act of law." See *Dumpor's Case*, 4 Co. 119, citing *Leeds v. Crompton*, 1 Rolle, Abr., 472.

The above statement refers to the effect on a condition of any *indulgence accorded to the lessee*, even if, as in the first case put

The resolution in *Dumpor's Case* may therefore be said to rest on two foundations, viz., (1) the doctrine of the entirety of a condition, and (2) the doctrine of its non-susceptibility to apportionment. But it is manifest that where, as in *Dumpor's Case*, the condition is only not to assign *without* license,

(which is but the doctrine of *Dumpor's Case*), it is not an indulgence *contrary* to the condition, but in pursuance of an exception which constitutes part of it. But the rule of non-apportionment applies also as to the *reversion of the lessor*, and forbids him to alter the entirety of the condition on pain of destroying it. Thus Lord Coke says: "A grantee of part of the reversion shall not take advantage of the condition. As if the lease be of three acres, reserving a rent, on condition, and the reversion is granted of two acres, the rent shall be apportioned by act of the parties, but the condition is destroyed, for that it is entire, and against common right." 2 Tho. Co. 90. This is the doctrine of the common law, and it was not changed by the Statute of 32 Hen. 8, c. 34, § 1 (as to which see § 275, *supra*). See *Winter's Case*, Dyer, 308; *Knight's Case*, 5 Co. 55; *Twynam v. Pickard*, 2 B. & Ald. 105, 110.

In accord with the law as above laid down in the *Touchstone* and by Lord Coke—that a condition is entire and indivisible, and that there can be no apportionment, except by act of law, as to either the reversion or the term demised—see *Van Rennselaer v. Jewett*, 5 Denio (N. Y.) 121, 126; *Williams v. Dakin*, 22 Wend. (N. Y.) 201 (affirming *Dakin v. Williams*, 17 Wend. 447); *Sharon Iron Works v. City of Erie*, 41 Pa. St. 341; *Clark v. Martin*, 49 Pa. St. 289. And see 1 Smith, Lead Cas. 105, 128; 1 Taylor, L. & T. § 286, note, § 296, § 410, note; 1 Washb. Real Prop. 503, 507; 2 Id. 21.

As to the exception noted above, that a condition may be apportioned by act of law (to which may be added for the wrong of the lessee), the doctrine is thus laid down in *Dumpor's Case*, 4 Co. 120: "But it was agreed that a condition may be apportioned in two cases: (1) by act in law, and (2) by act and wrong of the lessee. 1. By act in law, as if a man seised of two acres, the one in fee and the other in borough-English, has issue two sons, and leases both acres for life or years, rendering rent, with condition, and the lessor dies: in this case by this descent, which is an act in the law, the reversion, rent, and condition are divided. 2. By act and wrong of the lessee, as if the lessee make a [tortious] feoffment of part, or commits waste in part, and the

to assign *with* license does not dispense with the condition; but, in pursuing the exception, preserves its integrity; and, further, that the doctrine of non-apportionment is misapplied, as this has reference to a severance of ownership of the reversion, or to a discharge of part of the estate demised.¹ In the

lessee enters for the forfeiture, or recovers the place wasted, then the rent and condition shall be apportioned, for none shall take advantage of his own wrong, and the lessor shall not be prejudiced by the wrong of the lessee." See 2 Tho. Co. 90; 1 Shepp. Touch. 157. And see 7 Am. Law Review 623, where the doctrine of apportionment by act of law is said to extend to the assignee in bankruptcy, or levying creditor, of the grantor on condition subsequent.

It should be noted that the doctrine of non-apportionment of conditions by act of the parties does not extend to covenants. See *Twynnam v. Pickard*, 2 B. & Ald. 105; 1 Tayl. L. & T. § 410, n. 3.

In England the doctrine of non-apportionment of conditions by act of the parties has been changed by statutes, both as to the effect of a license granting indulgence to a lessee, and also as to the effect of a severance of the reversion. As to the former, by 22 & 23 Vict. c. 35, § 2, a license to one of several lessees to do an act forbidden without license enures to the benefit of such lessee only, and does not destroy the condition, which remain operative as to the other lessees; and a license as to part only of the leased property, is no dispensation as to the residue. As to a severance of the reversion the Conveyancing Act of 1881 (44 & 45 Vict., c. 41, § 12) provides that "every condition or right of re-entry and every other condition contained in leases made after 1881, shall, on the severance of the reversionary interest in the land leased, be apportioned, and remain annexed to the several parts of the reversionary estate as severed." See 1 Smith, Lead. Cas. 96; Williams, Real Prop. 572.

¹ NON-APPORTIONMENT OF CONDITIONS NO FOUNDATION FOR THE RULE IN *DUMPOR'S CASE*.—For an examination of the doctrine of non-apportionment of conditions, see an able article entitled "*Dumpor's Case*," 7 Am. Law Review 616 (July, 1873), understood to be from the pen of Joseph Willard, Esq., of Boston. The conclusion reached by the learned writer as to *Dumpor's Case* is that it was "originally without foundation in the law of conditions," and that to repudiate it would "relieve the law of to-day of an incubus, and bring our system of real property into harmony

language of Williams (Real Prop. 570): "The ground of this doctrine [that laid down in *Dumpor's Case*] was that every condition of re-entry was entire and indivisible; and as the condition had been waived [licensed] once, it could not be enforced again . . . ; but its application to a license to perform an act which was only prohibited when done *without* license, was not very apparent."¹

with common sense." And as to the doctrine of non-apportionment, he declares: "It affords no foundation for the rule in *Dumpor's Case*. The analogy attempted between these cases of destruction of the condition either by severance of the reversion, or discharge of part of the demised premises, and the rule there applied, wholly fails. In these cases, the lessor, re-entering, cannot be in of his old estate [as to this, see p. 382, *supra*, note]; if he should, he would in the latter instance destroy his prior grant to the lessee, and in the former to the other parcel reversioner. But no such bar existed to the re-entry of the lessor upon the assignee [a second assignee, or any more remote assignee after *mesne* assignments] in *Dumpor's Case*. The lessor so entering is in of his old estate, and all of it, and defeats no estate previously exempted from the operation of that entry. The license given relieved the estate of the lessee; but by the same act [*i. e.*, by the lessee's assignment under the license] that estate [the lessee's] terminated, and the assignee's commenced, to which the license had no application." That is to say, no application so as to authorize such first assignee to assign over to a second, as was done and allowed in *Dumpor's Case*; and if, contrary to the decision in that case, the lessors had been allowed to enter on the second, or any subsequent assignee, it would not have been in derogation of the license to assign given by the lessors to the lessee.

¹ CONDITION NOT TO ASSIGN, SIMPLICITER, NOT SAYING "WITHOUT LICENSE."—It will be remembered that in *Dumpor's Case* the condition in restraint of assignment by the lessee or his assigns contained the express exception "*without the special license of the lessors.*" But if the words italicized had been omitted, and the lessors had given an express license to assign, it would seem that the doctrine of that case would have been still applicable, and this *a fortiori*. For then the license granted would not have been in pursuance of the condition, but in derogation of it, and so might well be said to impair its entirety (or integrity).

In *Brummell v. McPherson*, 14 Ves. 172, Lord Eldon (as has been stated on page 416, *supra*) followed the doctrine of *Dumpor's Case*, saying: "Though *Dumpor's Case* always struck me as extraordinary, it is the law of the land at this day." But although Lord Eldon did not feel at liberty to depart from the doctrine of *Dumpor's Case*, he thus expressed his dissatisfaction with the doctrine laid down therein as to the effect of the lessors' license: "When a man demises to A, his executors, administrators, or assigns, with an agreement that if he, his executors, administrators, or assigns, assign without license, the lessor shall be at liberty to re-enter, it would have been perfectly reasonable originally to say that a license [*i. e.*, to the lessee] was not a dispensation with the condition [*i. e.*, as to assigns], the assignee being, by the very terms of the original contract, restrained, as well as the original lessee." And in *Doe v. Bliss*, 4 Taunt. 735 (decided in 1813), Mansfield, C. J., says: "Certainly the profession have always wondered at *Dumpor's Case*; but it has been law for so many centuries that we cannot now reverse it."

While the English judges—because of the respect due to age—declined to overrule *Dumpor's Case*, its practical inconvenience to tenants was severely felt. For, as is said by Williams (Real Prop. 571): "No landlord could venture to give

In Williams on Real Property, 570, the doctrine of *Dumpor's Case* is so stated as to include the case just put, omitting the words "without the special license of the lessors," and it is said: "So far as this reason [*viz.*, "every condition of re-entry is entire and indivisible"] extended to the breach of any covenant [with right of re-entry, nothing being said about license], it was certainly intelligible; but its application to a license to perform an act which was only prohibited when done *without* license, was not very apparent." The author here recognizes the doctrine of *Dumpor's Case* as applicable in both of the cases under consideration, and as more reasonable when the words "without license" are omitted, than when they are inserted in the condition as part of it. *Dumpor's Case* seem equally applicable whether the condition in restraint of assignment does or not contain the words "without license." See § 284, above; also § 285, *infra*.

a license to do any act which might be prohibited by the lease unless done with license, for fear of losing the benefit of the proviso for re-entry in case of any future breach of covenant." But relief was at last given, in 1859, by Lord St. Leonards' Act (22 & 23 Vict. c. 35, §§ 1, 2), which enacts, in substance, that after license to do any act which by the condition in a lease would create a forfeiture or give a right to re-enter if done without license, such license shall extend only to the permission actually given; and the condition or right of re-entry shall be and remain in all respects as if such license had not been given, except in respect of the particular matter authorized to be done." See Williams, Real Prop. 571; 1 Washb. Real Prop.. (317); note to *Dumpor's Case*, 1 Smith Lead. Cas. 95, 96, where the statute is set out at length.

§ 285. *Dumpor's Case in the United States.*—For a review of the American authorities up to 1873, see an article (referred to in note on page 422, *supra*) entitled "*Dumpor's Case*," 7 *American Law Review*, 616. The conclusion reached by the author as to the status of the doctrine of *Dumpor's Case* in the United States is that "with a single and somewhat doubtful exception, there has been no decision directly in point, and the rule has been recognized only to be distinguished." So in 12 *Harvard Law Review*, 272 (Nov., 1897), it is said in an editorial note that "the extent to which the rule prevails in the United States is uncertain. Almost always it is held inapplicable." And in the article in 7 *Am. Law Review*, at page 634, it is declared: "In no case has it [the doctrine of *Dumpor's Case*] been examined and approved on its intrinsic soundness."

On the other hand, it must be observed that, so far at least as the writer's research has extended, not only does the rule in *Dumpor's Case* remain unchanged by statute in the United States, but it has never been repudiated by any American decision. It is true that the disparaging remarks concerning it of Lord Eldon and Sir James Mansfield (quoted in § 284, *supra*) are sometimes referred to by American judges; and,

similar language of disapproval of their own is not wanting, as when Chancellor Walworth, in *Williams v. Dakin*, 22 Wend. (N. Y.), 201, 209, speaks of *Dumpor's Case*, as "carrying a technical principle beyond the bounds of common sense." But the rule itself is nowhere denied in the United States, but is recognized as having been "law for so many centuries" that it is now the "law of the land." See *Bleecker v. Smith*, 13 Wend. (N. Y.), 530, 533; *Dakin v. Williams*, 17 Wend. 447, 457; *Williams v. Dakin*, 22 Wend. 201, 209; *Lynde v. Hough*, 27 Barb. 415, 422; *Murray v. Harway*, 56 N. Y. 337; *Gannett v. Albree*, 103 Mass. 372; *Pennock v. Lyons*, 118 Mass. 92; *Dickey v. McCullough*, 2 W. & S. (Pa.) 88; *Sharon Iron Co. v. City of Erie*, 41 Pa. St. 341; *McKildoe v. Darracott*, 13 Gratt. (Va.) 278; *Tenn. & Co. v. Scott*, 14 Mo. 46; *Chipman v. Emeric*, 5 Cal. 49; *Reid v. Weissner, & Co., Brewing Co.*, 88 Md. 234 (40 Atl. 877). And see American note to *Dumpor's Case*, 1 Sm. Lead. Cas. 103; note to *Cross v. Carson* (Ind.), 44 Am. Dec. 748; 1 Washb. Real Prop. (5th ed.), 503, and notes; 2 Id. 21; 1 Taylor, L. & T., § 286; also § 410, and note 3.¹

¹ DOES A CONDITION IN A LEASE NOT TO ASSIGN WITHOUT LICENSE EXTEND TO THE LESSEE'S ASSIGNS WHEN THEY ARE NOT MENTIONED.—In several of the cases above cited, in which the rule in *Dumpor's Case* was recognized, the condition restraining assignment did not mention assigns. On this ground it is claimed in 7 Am. Law Review, 641, that as the restraint was personal to the lessee, and did not extend to the assignee, the result would have been the same without resort to the rule in *Dumpor's Case*, and hence the reliance on the rule was unnecessary, and *obiter dictum*.

That a condition not to assign without license does not extend to assigns when they are not mentioned was early held in England in an anonymous case in *Dyer*, 66 a. which was followed in *Doe v. Smith*, 5 Taunt. 795. And see *Weatherall v. Geering*, 12 Ves. 504, 511. The same doctrine is laid down in *Dougherty v. Matthews*, 35 Mo. 520 (88 Am. Dec. 126). See also 7 Am. Law Review 260, 261. To the contrary, are the American cases above referred to (*Chipman v. Emeric*, 5 Cal. 49; *Dickey v. McCullough*, 2 W. & S. 88; *Lynde v. Hough*, 27 Barb. 415) in which it is as-

Indeed, not only has the doctrine of *Dumpor's Case* not been repudiated by the American courts, but it has sometimes been carried beyond the facts in that case, and has been deemed to apply to a *covenant* as well as to a condition (*Reid v. Weissner, &c., Brewing Co.* 88 Md. 234, 40 Atl. 887), and even to the implied waiver of the breach of a condition from the acceptance of rent (*Murray v. Harway*, 56 N. Y. 337).

That the better doctrine is that the rule in *Dumpor's Case* does not extend to a *covenant* not to assign, see *Twynam v. Pickard*, 2 B. & Ald. 105; *Paul v. Nurse*, 8 B. & C. 486; *Williams v. Dakin*, 22 Wend. 201, 209; *Gannett v. Albree*, 103 Mass. 372; 1 Smith L. C. 103; 1 Tayl. L. & T. § 410, n. 3; 7 Am. Law Review, 634-7; 12 Harv. Law Review, 273.

Upon the question whether the rule in *Dumpor's Case* ex-

sumed that assigns were originally bound though not mentioned, but it was held that they were freed from the restraint by the operation of the rule in *Dumpor's Case*.

On principle, as has been stated in § 272, *supra*, the question whether a condition extends to assigns when they are not mentioned should be a question of intention, depending on the construction of the language of the condition. If the language be "the said lessee shall not assign," not mentioning assigns, this might well be held personal to the lessee. But if it be, "the said lease shall not be assigned," this should, on principle, extend to assigns, though they are not mentioned.

As to a *covenant* not to assign, this has been held "to run with the land," as touching and concerning it, and so to bind assigns, at least when they are mentioned. *Williams v. Earle*, L. R. 3 Q. B. 739, 749, *per* Blackburn, J. And it would seem from the reasoning in this case that the decision would have been the same if assigns had not been mentioned, a result which seems right on principle. See 1 Taylor, L. & T. § 413; note to *Geizler v. De Graaf* (N. Y.), 82 Am. St. Rep. 690; *Reid v. Weissner, &c., Brewing Co.*, 88 Md. 234 (40 Atl. 877). But see 12 Harv. Law Review, 273.

In Virginia by Code, § 2445: "When a deed uses the words 'the said ——— covenants' such covenant shall have the same effect as if it was expressed to be by the covenantor for himself, his heirs, personal representatives, and assigns, and shall be deemed to be with the covenantee, his heirs, personal representatives, and assigns." See § 63, *supra*.

tends to an implied waiver by the acceptance of rent after breach of a condition not to assign, there is conflict. See 1 Washb. Real Prop. 503, where it is said: "A mere waiver by acquiescence, without any actual license, as, for instance by taking rent of an assignee, where the original tenant had been restrained from assigning by a condition in his lease, though it would ratify such an assignment, would not extend to future breaches of the same kind, so as to prevent the lessor's entering and defeating the demise for a new assignment made." On the other hand, in 1 Taylor, L. & T. § 411, it is said: "The acceptance of rent by a landlord after breach of a condition not to assign is tantamount to a license." If this be true, the rule in *Dumpro's Case* of course applies, and the landlord who has received rent from the first assignee loses thereby not only the right to enter for the first assignment, but also the right to enter for a second. See as to these conflicting views, 7 Am. Law Review, 633, where the above statement of the law by Washburn is approved.

In Williams on Real Prop. (17th ed.), 571, after stating the change by Lord St. Leonards' Act as to the effect of a license (as to which see § 284, *supra*) it is added "This Act, however, failed to provide for the case of actual waiver of a breach of covenant [with right of re-entry therefor]. On this point the law stood thus. The receipt of rent by a landlord, after notice of a breach of covenant committed by the tenant prior to the rent becoming due, was an implied waiver of the right of re-entry; but if the breach was of a continuing kind, this implied waiver did not extend to the breach which continued [or recurred] after the receipt. An implied waiver of this kind did not destroy the condition of re-entry; but an actual waiver had this effect. Few landlords, therefore, were disposed to give an actual waiver. This inconvenience was met by a subsequent act [23 & 24 Vict. c. 38, § 6], providing that in future any actual waiver by the lessor, in any particular instance, of the benefit of any covenant or condition in any lease, should not be deemed to be a general waiver of any such covenant or condition, unless an intention to that

effect should appear.” And see 1 Smith Lead. Cas. 96, where the act of 23 & 24 Vict. *supra*, is set out at length, and is spoken of as annulling the doctrine of *Dumpor's Case* when there has been an *actual waiver*, thereby supplementing the previous statute which had annulled it in case of an express license.¹

¹ IS A CONDITION NOT TO ASSIGN WITHOUT LICENSE A CONTINUOUS CONDITION.—In England, according to the above statement of the law by Williams, and under the statutes referred to, the rule in *Dumpor's Case* can now operate, if at all, only on an implied waiver of a condition not to assign without license. Upon the facts of *Dumpor's Case*, a *license* is necessary to its operation; but a license is curtailed in its effect by Lord St. Leonards' Act; and the extension of the doctrine to an *actual waiver*, as equivalent to a license, is annulled by the later statute. This leaves only implied waiver to be reckoned with; and the effect of this, according to Williams, “if the breach is of a continuing kind,” is confined as a waiver to the breach which occurred before the receipt of the rent from which the waiver is implied. As to what is meant by a “continuing” breach, see note on p. 410, *supra*, where it is shown that such breach may either be strictly continuing or only recurrent. If, then, a condition not to assign without license can be considered recurrent, an implied waiver of the first assignment should condone it only, and should not be held to authorize the assignee to assign without license.

As has been seen (p. 410, *supra*, note), it is conceded that an implied waiver by receipt of rent after one sub-lease will not operate to excuse a second. Thus in Taylor L. & T. § 411, after the statement (quoted above) that the acceptance of rent by a landlord after a breach of a condition not to assign is tantamount to a license, it is added: “But it is otherwise with regard to a condition not to underlet, for in this case any subsequent underletting will authorize the landlord to re-enter.” If, however, the rule in *Dumpor's Case* does not apply to a second *sub-lease*, when there is a mere implied waiver by the acceptance of rent after the first sub-lease—because, as is said in *Doe v. Bliss*, 4 Taunt. 733, “this tolerance is not tantamount to a license”—no reason is perceived why acceptance of rent should have a different effect in the case of a second *assignment*. For the implied waiver is no more “tantamount to a license” in the case of assignment than in the case of a sub-lease, and the rule in *Dumpor's Case* can have no operation.

It may be added that it has been held in Missouri that the doctrine of *Dumpor's Case*—that a condition once dispensed with is gone forever—it confined to grants of land, and does not extend to personal contracts. Thus a condition in a policy of insurance that the assured should obtain the assent of the company to a change of ownership of the insured property was held not to be discharged (but only dispensed with *pro hac vice*) by the assent of the company to one change of ownership, and to become again operative on a subsequent change without such assent. *Tenn. &c. Co. v. Scott*, 14 Mo. 46; *Eddy*

It follows, therefore, that if the distinction alleged by Taylor between a sub-lease and an assignment, as to the effect of an implied waiver be sound (and see *McKildoe v. Darracott*, 13 Gratt. 278, 286), it must be because of a difference in the nature of the two restraints—the breach of a sub-lease being potentially continuing, and the breach of an assignment not continuing, but once for all.

It is believed, however, that the true doctrine is that a condition not to assign is capable of a continuing (or recurrent) breach, and that on principle an implied waiver of the first breach does not extend to a second. As is well said in 7 Am. Law Review 639: "It is true that in some of these cases the condition against assigning has been distinguished as capable from its nature of one breach only. But such a distinction is without foundation. If the condition was solely framed to bind the lessee, it might be otherwise, as the condition with its covenant is perhaps unable to run without the mention of assigns. [See as to this p. 426, *supra*, note.] But where assigns are mentioned, the condition is necessarily continuous, because it applies in terms to persons who can only come under its force after one authorized breach; and it presents a stronger case than that of a condition against underletting, because it extends expressly where that and similar conditions apply only by inference."

It is submitted, therefore, that a condition not to assign without license is capable of a recurrent operation (or subsequent breach); and that as an implied waiver of a first breach is not within the rule in *Dumpor's Case*, such waiver should not destroy the condition; and that the contrary view, adopted by Taylor and held in *Murray v. Harway*, 56 N. Y. 337, is unsound on principle. But see in accord with *Murray v. Harway*, *Conger v. Duryee*, 90 N. Y. 594, 599; *McGlynn v. Moore*, 25 Cal. 384, 395.

v. *Ins. Co.* 21 Mo. 587; 1 Smith Lead. Cas. 104; 7 Am. Law Review, 634. But see *Sharon Iron Works v. City of Erie*, 41 Pa. St. 341, 352, where it is said: "Whether the rule in *Dumpor's Case*, as said in two Missouri cases, 'under which conditions once waived are wholly gone,' is restricted to grants of lands and incorporeal hereditaments, and forms no part of the general law of contracts, I shall not stop to consider, for the case before us is that of a condition annexed to a grant of land in fee-simple, expressly dispensed with and waived by the grantors."

CHAPTER XIV.

DOWER AND CURTESY.

§ 286. **Definition of Dower.**¹—Dower is thus defined by Blackstone (2 Bl. Com. 129): “Tenant in dower is where the husband of a woman is seised of an estate of inheritance, and dies; in this case the wife shall have the third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold for herself during the term of her natural life.” The above definition omits to state that the husband’s lands and tenements must be such that the wife’s issue by him, if any, would be capable of inheriting them as heir to the husband. See 2 Bl. Com. 131. It is also inaccurate in this, that under it the wife would be dowable of lands and tenements of which her husband was seised as a joint tenant with a third person. That there is no dower in such case, see § 291, *infra*.²

¹ **DEFINITION OF DOWER.**—It is difficult to state with precision, within the limits proper for a definition, all the requisites which must concur in order to entitle the widow to dower at common law. The American classic on the subject of dower is the learned and exhaustive work of Mr. Scribner; and it is noteworthy, that so far as the writer has been able to discover, he nowhere attempts a definition of dower. This valuable treatise (in two volumes, of which a second edition was published in 1883) is recommended to the reader in all cases in which fuller information is desired than it is possible to give in a single chapter of an elementary work on Real Property.

² **DOWER DEPENDENT ON POSSIBILITY OF ISSUE CAPABLE OF INHERITING THE HUSBAND’S LAND.**—In the English books, the cases usually put in which the possible issue of the wife would be incapable of inheriting the land arise under settlements of entailed estates. See 2 Bl. Com. 131. The same examples apply to curtesy,

A fuller definition of the dower is given in 10 Am. & Eng. Ency. Law (2d ed.), 125, as follows: "Dower, at common law, is an estate for life to which the wife is entitled on the death of her husband, in the third part of the legal estates of

except as to the actual birth of issue. See Williams, R. P., 353 (quoted, *infra*, p. 436, note). But as estates-tail are abolished in the United States, such examples are inapplicable here. There is, however, another class of cases which illustrate the rule, and render it still of importance, viz., cases in which the limitation is so framed that the issue, if they take at all, must take by purchase, and not by descent.

The leading cases under this head are *Sumner v. Partridge*, 2 Atk. 47, and *Barker v. Barker*, 2 Sim. 249—both cases of curtesy, but equally applicable to dower. Thus in *Sumner v. Partridge*, *supra*, there was a devise, "To A and her heirs; and if she die before her husband, he to have £20 a year for life; remainder to go to her children." The wife died before the husband, and he claimed curtesy. In denying it, Lord Hardwicke said: "A tenancy by the curtesy must arise out of the inheritance, which must vest in the wife, and there must be a possibility of its descending on the children; now they take hereby virtue of a remainder over, not by descent from the mother. . . . Neither a tenant in dower or curtesy can entitle themselves to an estate in dower, or curtesy, where the children who are left cannot possibly take an inheritance, for the moment of time the husband takes by the curtesy, the inheritance must descend on the children; and therefore it is impossible in the present case to maintain the father is tenant by the curtesy." See 1 Scribner, Dower, 227, 310; 1 Bishop, Mar. Wom. § 251, 481; 1 Bright, H. & W., 122, 327; 2 Min. Ins. (4th ed.), 128, 152.

It is noticeable that the Virginia statute (C. V. § 2267) seems to confer the right of dower without regard to the requisite now under consideration. It declares: "A widow shall be endowed of one-third of all the real estate whereof her husband, or any other to his use, was, at any time during the coverture, seised of an estate of inheritance, unless her right to such dower shall have been lawfully barred or extinguished." In New Jersey, under a similar statute, the point was mooted (though not passed on by the court) whether the widow was not entitled to dower regardless of the potentiality of her possible issue to inherit. *Montgomery v. Bruere*, 4 N. J. Law, 300, 305. It is not believed, however, that any such change is contemplated by the Virginia

inheritance in lands and tenements of which the husband was seised in deed or in law, in fee simple or fee tail, at any time during the coverture, and to which any issue which the wife might have had might by any possibility have been heir." This definition seems complete and satisfactory, except that, like Blackstone's above, it would give the wife dower in lands and tenements of which the husband was seised as a joint tenant with a third person.¹

It will be observed that both of the above definitions are of dower consummate by the death of the husband. For the nature of the inchoate dower right of a wife during coverture, see p. 438, *infra*, note.

statute. As has been seen above, Blackstone's definition of dower omits this requisite, but he afterwards states it explicitly. No doubt the framers of the Virginia statute were following Blackstone's definition, adding to it the words, "or any other to his use;" and their attention was not directed to, nor did they mean to recite, all the recognized common law requisites for dower.

¹ SUMMARY OF REQUISITES FOR DOWER.—The following description of dower is taken from *Williams on Real Property* (17th ed.) 367: "If at any time during the coverture the husband became solely seised [or, rather, seised otherwise than in *joint tenancy*] of any estate of inheritance, that is fee simple or fee tail, in lands to which any issue, which the wife might have had, might by possibility have been heir, she from that time became entitled, on his decease, to have one equal third part of the same lands allotted to her, to be enjoyed by her in severalty during the remainder of her life. . . . It was necessary, however, that the husband should be seised of an estate of inheritance at law; for the Court of Chancery, whilst it allowed to husbands curtesy of their wives' equitable estates, withheld from wives a like privilege of dower out of the equitable estates of their husbands. The estate moreover must have been held in severalty or in common, and not in joint tenancy. . . . The estate was also required to be an estate of inheritance in possession; although a seisin in law obtained by the husband was sufficient to cause his wife's right of dower to attach. In no case also was any issue required to be actually born; it was sufficient that the wife might have had issue who might have inherited."

§ 287. **Definition of Curtesy.**—Curtesy is thus defined by Blackstone (2 Bl. Com. 126): “Tenant by the curtesy of England is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee simple or fee tail, and has by her issue born alive, which was capable of inheriting her estate. In this case he shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England.” The above definition omits to state that the seisin of the wife must be actual or in fact, and not a mere seisin in law. It is also inaccurate in this that it would give to a husband curtesy in lands of which the wife was seised jointly with a third person who survived her. See § 291, *infra*.¹

¹ VALID MARRIAGE ESSENTIAL TO RIGHT OF DOWER OR CURTESY.—Of course, if there is no pretense of marriage, but only a meretricious connection, between a man and woman, she is not entitled to dower in his land. *Robinson v. Robinson*, 188 Ill. 371 (58 N. E. 906). And though there is a proper marriage ceremony, there is no marriage, and therefore no dower, if for disabilities existing at the time of its celebration the so-called marriage is *ipso facto* null and void. And in this case, as the marriage is void, there need be no decree of divorce, or other legal process. But if the effect of the disability is to render the marriage not void, but voidable only, then the marriage is valid for all civil purposes unless it is annulled during the life of both parties. Unless, therefore, such voidable marriage be annulled in the lifetime of the husband, the widow will be entitled to dower. 2 Bl. Com. 434, 436; 1 Washb. Real Prop. (5th ed.) 221; 1 Scribner, Dower 130; 19 Am. & Eng. Ency. Law (2d ed.) 1210; *Price v. Price*, 124 N. Y. 589 (27 N. E. 383); *McIlvain v. Scheibley* (Ky.), 59 S. W. 498.

From the above it is manifest that it is highly important when a widow claims dower, and there has been no decree of nullity, or divorce, to distinguish between a marriage void *ipso facto* on the one hand, and a marriage merely voidable on the other. It is not proposed, however, to enter fully into the subject here. Reference is made to the authorities cited above, and also to 2 Min. Ins. (4th ed.) 115, 135, and 1 Bishop, Marr., Div., and Sep., §§ 252–292, where the subject is discussed at length. It will be sufficient to state that by the law of Virginia the only void marriages are: (1) Those between a white person and a colored person; (2)

A fuller definition of curtesy is given in 4 Kent Com. (13th ed.) 27: "Tenancy by the curtesy is an estate for life created by the act of the law. When a man married a woman seised, at any time during the coverture, of an estate of inheritance in severalty, in coparcenary, or in common, and has issue by her born alive, and which might by possibility

those which are prohibited by law on account of either of the parties having a former wife or husband then living; and (3) those solemnized when either of the parties was under the age of consent (14 for the male, and 12 for the female), if they separate during such non-age, and do not cohabit afterwards. C. V., §§ 2252, 2254. On the other hand, it is declared (§ 2252) that "all marriages which are prohibited by law on account of consanguinity or affinity between the parties; all marriages solemnized when either of the parties was insane, or incapable from physical causes of entering into the marriage state, shall, if solemnized within this State, be void from the time they shall be so declared by a decree of divorce, or nullity, or from the time of the conviction of the parties under § 3783." For the effect on dower of a divorce *a vinculo* for original or supervenient causes, see § —, *infra*.

As to the ceremonial of marriage, the view taken of the common law in the United States is that by it a valid marriage could be constituted by the present consent of competent parties (*per verba de praesenti*) or *per verba de futuro cum copula*. And further it is the general doctrine in the United States that statutes regulating the marriage ceremony by requiring certain formalities are, in the absence of express words of nullity in case of their omission, to be deemed not mandatory, but directory only; and a marriage valid at common law is still valid under the statutes, though their requirements are disregarded. See 1 Bishop Marr., Div. and Sep. 410, 438; *Meister v. Moore*, 96 U. S. 76; and 6 Va. Law Reg. 437, where many authorities are collected. But in *Offield v. Davis* (Va.), 40 S. E. 910, it is declared that § 2222 of the Code is mandatory and not directory in its provisions, and that it wholly abrogates the common law of marriage, so that no marriage, if it takes place in Virginia, is valid (if not within the statutory exceptions) unless under a license, and solemnized according to the statute; and it was held that a woman relying upon a marriage with the decedent by mutual consent, without a license and without a celebrant, could not recover dower in such decedent's land. And see, to the same effect, though by way of

inherit the same estate as heir to the wife, and the wife dies in the lifetime of the husband, he holds the land during his life by the curtesy of England; and it is immaterial whether the issue be living at the time of the seisin, or at the death of the wife, or whether it was born before or after the seisin." This definition is full and satisfactory, except that, like Blackstone's, it omits to state that the seisin of the wife must be actual or in fact, and not a mere seisin in law.¹

It will be observed that the above definitions are of curtesy consummate by the death of the wife. For the nature of curtesy initiate during the coverture, beginning as soon as the

dictum, *Beverlin v. Beverlin*, 29 W. Va. 732, under a statute identical with that in Virginia.

It need hardly be added that the above principles are equally applicable when a man claims curtesy in a woman's land.

¹ SUMMARY OF REQUISITES FOR CURTESY.—The following descriptions of curtesy is taken from *Williams on Real Property* (17th ed.), p. 353: "The husband also required by marriage a seisin of all his wife's freeholds jointly with her. [This, as tenant by marital right.] If, however, the husband had issue by his wife born alive that might by possibility inherit the estate as her heir, he became entitled to an estate, after his wife's death, for the residue of his own life, in such lands and tenements of his wife as she was solely seised of, in fee simple or fee tail in possession. The husband, while in the enjoyment of this estate, was called tenant by the *curtesy* of England, or more shortly, tenant by the curtesy. But the estate must have been a several one, or else held under a tenancy in common, and must not have been one of which the wife was seised jointly with any other person or persons. . . . The husband must also have had by his wife issue born alive. . . . The issue must also have been capable of inheriting as heir to the wife. Thus, if the wife were seised of lands in tail male, the birth of a daughter only would not entitle her husband to be tenant by the curtesy; for the daughter could not by possibility inherit such an estate from her mother. And it was necessary that the wife should have acquired an actual seisin of all estates of which it was possible that an actual seisin could be obtained; for the husband had it in his own power to obtain for his wife an actual seisin; and it was his own fault if he had not done so."

husband has by the wife issue born alive, capable of inheriting her land, see § —, *infra*.

§ 288. **Origin of Dower and Curtesy.**—For the different views as to the origin of the expression “by the curtesy of England,” see 2 Bl. Com. (126): Digby, Hist. Law of Real Prop. (4th ed.) 173; 8 Am. & Eng. Ency. Law (2d ed.) 508. The better opinion is that the husband was called tenant by the curtesy because, *after issue born*, he was entitled to do homage *alone* for the wife’s lands of inheritance, and thus became one of the *pares curtis*, or attendants upon the lord’s court. 1 Washb. on R. P. (128); *Porter v. Porter*, 27 Grat. 599; *Breeding v. Davis*, 77 Va. 639, 646.

Though it is usually said that curtesy is not of feudal origin, yet Blackstone is of opinion that substantial feudal reasons can be given for its introduction. 2 Bl. Com. (126); 1 Washb. on R. P. (128). Thus, as we have seen, after issue born capable of being heir to the wife’s lands, the husband did homage for them alone; his life estate as tenant by the curtesy *initiate* then began; and tenure was established between the husband and the lord. As long as the husband lived, the lord had an adult retainer to perform the feudal services, a matter of great importance. *Poindexter v. Jeffries*, 15 Gratt. 376; *Brown v. Bockover*, 84 Va. 424; *Wyatt v. Smith*, 25 W. Va. 813; *Arnold v. Bunnell*, 42 W. Va. 473 (26 S. E. 359).

Dower, however, is not of feudal origin. It is an estate holden by the widow of the heir, who holds of the lord. There is no tenure, therefore, between the dowress and the lord, and her interest in the land is regarded as received from her husband for her support after his death; though by his death the land and the duty of assigning dower devolve upon the heir, of whom the widow holds by subinfeudation. “She comes to her dower in the *per i. e. by* her husband, and is *in* in continuance of his estate.” 1 Tho. Coke, 589, n. (Y); 2 Scribner, Dower (2d ed.) 772; 2 Min. Ins. (4th ed.) 160;

Emerson v. Harris, 6 Metc. (Mass.) 475; *Johnson v. Gordon*, 102 Ga. 350 (30 S. E. 507).¹

§ 289. **Differences Between Curtesy and Dower.**—Let us see how the differences between curtesy and dower may be accounted for on principle.

Curtesy, because of tenure, arose on the birth of issue; dower, because needed for support, whether there was issue or not. Curtesy was of all the wife's lands, because the husband had done homage for all; dower of one-third of the husband's as enough for the wife's maintenance. Curtesy, because of tenure, could only attach where the wife had actual seisin; dower, because of bounty, was allowed in lands of which the husband had only seisin in law. Curtesy vested without assignment, because the husband was already in possession; dower vested under the heir's assignment, as the widow must hold under him. Curtesy was not avoided by the husband's adultery, because held of the lord in consideration of feudal services; dower was forfeited by the wife's elopement and

¹ORIGIN OF DOWER.—In 1 Bishop, *Law of Married Women* (a valuable and suggestive work, now unfortunately out of print) it is said, § 245: "Legal writers differ in their statements of the history of the law of dower. It is important for us only to know that dower existed in some form in the very early periods of the English law, and that it was always deemed to be given by way of sustenance to the widow. Some of the old books add 'and children'; but it is not difficult to see that this is an interpolation upon the true doctrine—the law having made other provision for the maintenance of the children. As observed by the editor of the 11th edition of *Coke upon Littleton*: 'The reason why the law gives the wife dower will appear if we consider how the law stood anciently; for by the old law, if this provision had not been made, and the party at the marriage had made no assignment of dower, the wife would have been without any provision. For the personal estates even of the richest were then very inconsiderable; and before trusts were invented (which is but lately), the husband could give the wife nothing during his own life; nor could he provide for her by will, because lands could not be devised (unless it were in some particular places by custom) till the Statute of Hen. 8.'"

adultery, which proved her unworthy of the husband's bounty. In a word, curtesy was a matter between the lord and his vassal, the husband; dower a matter between the husband and his wife.¹

§ 290. **Difference between Seisin in Fact, Seisin in Law, and a Right of Action or Entry.**—(1) *Seisin in Fact*—This was obtained at common law by livery of seisin made upon a feoffment, or by actual entry of the heir on the ancestor's land. Now it is obtained by the entry of the heir; and also, constructively, by a patent from the State, by a deed operating

¹ **NATURE OF A WIFE'S INCHOATE RIGHT OF DOWER.**—In the lifetime of the husband, the dower of the wife is inchoate, *i. e.*, her right to dower, while attached in a sense to the lands of which the husband is, or has been, seised during the coverture, is potential only, and contingent on her surviving him. The nature of inchoate dower is well stated in *Witthaus v. Schack*, 105 N. Y. 332, 336, by Ruger, C. J.: "The settled theory of the law as to the nature of an inchoate right of dower is that it is not an estate or interest in land at all, but is a contingent claim arising, not out of contract, but as an institution of law, constituting a mere *chose in action*, incapable of transfer by grant or conveyance, but susceptible only, during its inchoate state, of extinguishment. By force of the statute, this is effected by the act of the wife in joining with her husband in the execution of a deed of the land. Such deed, so far as the wife is concerned, operates as a release or satisfaction of the interest, and not as a conveyance, and removes an encumbrance, instead of transferring an interest or estate." See similar language used by Staples, J., in *Corr v. Porter*, 33 Gratt. (Va.) 278, 285, quoted *infra* in § 304. The same view is taken of a wife's contingent dower in *Mason v. Mason*, 140 Mass. 63 (3 N. E. 19); *Flynn v. Flynn*, 171 Mass. 312 (68 Am. St. Rep. 427); *Smith v. Howell*, 53 Ark. 279 (13 S. W. 929); *Hatcher v. Buford*, 60 Ark. 169 (29 S. W. 641); *Gatewood v. Tomlinson* (Ga.) 18 S. E. 318; *Johnson v. Gordon* (Ga.) 30 S. E. 507; *Blevins v. Smith*, 104 Mo. 583 (16 S. W. 213); *Youmans v. Wagner*, 30 S. C. 302 (9 S. E. 106); *Brooks v. McMeekin*, 37 S. C. 285 (15 S. E. 1019); *Tomlinson v. Nickell*, 25 W. Va. 148; *George v. Hess*, 48 W. Va. 534 (37 S. E. 564). And see 1 Washb. Real. Prop. (5th ed.) 312; 2 Scribner, Dower (2d ed.) 5-8; 10 Am. & Eng. Ency. Law (2d ed.) 142; 1 Bishop Mar. Wom. § 347.

under the Statute of Uses, by the statutory deed of grant in Virginia, and, it is said, by a devise. *Clay v. White*, 1 Munf. (Va.) 162 (see § 141, *supra*); *Carpenter v. Garrett*, 75 Va. 129; *Muse v. Friedenwald*, 77 Va. 57; *Seim v. O'Grady*, 42 W. Va. 77 (24 S. E. 994). See also, Co. Litt. 111 *a*; 2 Tho. Co. 645; 2 Min. Ins. (4th ed.) 123. At common law, seisin in fact, actual or constructive, is required of the wife's land in order to entitle the husband to curtesy therein. See references above, and also 1 Bishop, Mar. Wom. §§ 250, 496-506; 4 Kent Com. 29; 1 Washb. Real Prop. 135.¹ See, also, note to *Jackson v. Johnson* (N. Y.), 15 Am. Dec. 450.

¹ SEISIN FOR CURTESY—WHY ACTUAL SEISIN REQUIRED AT COMMON LAW.—The strictness of the common law in requiring actual entry on land descended to the wife in order to entitle the husband to curtesy, is thus illustrated by Perkins (*Profitable Book*, 470): "But if possession in law of lands or tenements in fee descend unto a married woman, which lands are in the county of York, and the husband and his wife are dwelling in the county of Essex, and the wife dieth within one day after the descent, so as the husband could not enter during the coverture for the shortness of the time, yet he shall not be tenant by the curtesy; and yet, according to common pretense, there is no default in the husband. But it may be said that the husband of the woman, before the death of the ancestor of the woman, might have spoken unto a man dwelling near unto the place where the lands lay, to enter for the woman, as in her right, immediately after the death of her ancestor."

The true reason for denying curtesy at common law to the husband of a wife never actually seised is the default of the husband in not obtaining for his wife the actual seisin during the coverture, and not, as is stated by Coke and Blackstone, because such actual seisin was necessary to make the wife the stock of descent. See for elaborate refutation of this doctrine of Coke and Blackstone, Wms., Real Prop., *Appendix D*. Also 1 Lom. Dig. p. 78, note; 2 Min. Ins. (4th ed.) 123. It follows that a change of the law of descent, allowing the ancestor to be the stock without actual seisin, does not *per se* affect the rule requiring actual seisin of the wife to entitle the husband to curtesy. 1 Bishop, Mar. Wom. § 299. But in Connecticut and Ohio the reason of Coke and Blackstone for denying curtesy in the lands of a non-seised wife

(2) *Seisin in Law*.—This is the seisin of an heir before entry on the land, after descent cast on him by the death of the ancestor, provided there is no person in possession holding adversely to the heir. Such seisin in law is at common law sufficient for dower, but it is not sufficient for curtesy. 1 Scribner, Dower, 251; 1 Bishop, Mar. Wom. § 250; 10 Am. & Eng. Ency. Law, 131.

(3) *Right of Entry or Action*.—When the owner of land is out of possession, and another is in possession adversely to him, claiming the land as his own, such owner has no seisin either in fact or in law, but a mere right of entry or action. Another example is the right of the grantor of land on condition subsequent to make entry or bring an action to enforce forfeiture for its breach. See § 137, *supra*; also § 275, *supra*. At common law there was neither curtesy nor dower in a mere right of entry or action; but in England and in some of our States dower is now allowed therein by statute.¹

is approved, and the effect of the abolition of the maxim *seisina facit stipitem* in those States is held to be to give to the husband curtesy, not only in lands of which the wife had during the coverture only a seisin in law, but even in lands of which she had a *mere right of entry*, the lands being in the adverse possession of a third person. *Bush v. Bradley*, 4 Day (Conn.) 498; *Borland v. Marshall*, 2 Ohio St. 308. See 1 Washb. R. P. 182; 8 Am. and Eng. Ency. Law, 512.

¹ DOWER IN RIGHT OF ENTRY OR ACTION.—(1) *At Common Law*.—The text-writers usually quote this language from Perkins (§ 366): “If a man seised of land in fee be disseised of the same, and then take a wife, and die without re-entering, she shall not have dower.” On this Scribner comments as follows: “The material point in this case, it will be observed, consists in the fact that the seisin of the husband was divested by the entry of the disseisor *before* the marriage, and continued thus divested during the whole period of the coverture. The husband had a right of entry on the land, but this was not sufficient to give dower to the wife. Had he defeated the wrongful estate of the disseisor by ousting him from the possession at any time during the coverture, the seisin would have been restored to him, and would have entitled her to dower; but inasmuch as the right of entry was not

At common law, as has been said, it is essential for curtesy that the wife, or the husband for her, should have had seisin *in fact* of her lands during coverture. But this rule has been greatly relaxed in the United States. See 2 Bl. Com. (Shars-

asserted, there was no moment of time during the coverture when, in contemplation of law, he was seised of the premises. This is one of the instances mentioned by Perkins in which the husband may prejudice his wife in her dower by his laches of entry." 1 Scribner, Dower, (2d ed.) 255.

In 1 Park on Dower, 25, after quoting Perkins as above, it is added: "Upon the same principle, if a man grant an estate on condition [subsequent] on the part of the grantee, and afterwards marries, although the condition is broken in his lifetime, yet as a condition annexed to an estate of freehold will not revert the estate in the grantor without entry or claim, if he neglects to take advantage of the breach, his wife will not be dowable, for he had no more [at any time during the coverture] than a right or title of entry for condition broken." See, also, 10 Am. & Eng. Ency. Law (2d ed.) 132; *Thompson v. Thompson*, 1 Jones, L. (46 N. C.) 430; *Ellis v. Kyger*, 90 Mo. 600 (3 S. W. 23).

(2) *Under Statute*.—The English act giving dower "in a right of entry or action in any land" was passed August 29, 1833, but applies only to the dower of women married after January 1, 1834. See 1 Scribner, Dower, Appendix; also p. 448, *infra*, note. The Virginia statute is based on the English (Rep. Rev. Va. Code of 1849, p. 564, note), and is as follows (Code, 1849, ch. 110, § 2; Code, 1887, § 2268):

"When a husband, or any other to his use, shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if the husband or such other had recovered possession thereof, she shall be entitled to such dower, although there shall have been no recovery of possession."

The construction of the above statute is not free from difficulty. It seems plain that the intention is, when the husband *dies entitled to entry or action*, not to allow the heir to recover the land for his sole benefit, but to allow the widow dower therein. But suppose the heir declines to make entry for breach of condition subsequent (preferring to waive the right), or is unwilling to proceed against the disseisor of the husband. Clearly, the heir would not be allowed thus to defeat the right of dower which the statute expressly gives the widow, assuming that the

wood's ed.) 127, n. 11. Certainly in case of wild and uncultivated lands, actual entry is generally held unnecessary. *Jackson v. Sellick*, 8 Johns, 262; *Davis v. Mason*, 1 Pet. 503; *Mettler v. Miller*, 129 Ill. 630 (22 N. E. 529); 1 Lom.

husband at his death still had a right of entry or action. But what would be the widow's remedy? Probably a bill in equity under § 2276 of the Code would lie, the heir at law and the disseisor, or the grantee on condition, being made parties defendant, and perhaps, under the same statute, an action of ejectment would be allowable. See 2 Min. Ins. (4th ed.) 162.

But suppose the husband, though at one time during the coverture entitled to entry or action, waives in his lifetime the right of entry for condition broken, or compromises or releases his claim against the disseisor; can the widow, nevertheless, demand her dower, on the ground that the statute so provides? The language of the statute does not make it clear whether it is enough that the husband was entitled to the right of entry or action *at any time during the coverture*, or whether he must be so entitled at his death. It is believed that the latter is the true construction, and that the statute is not intended to deprive the husband of his right to waive the condition, or to release his claim, but only to give dower as against the heir when the husband has not so waived or released. It will be seen hereafter (§ 293) that the general rule denies dower in equitable estates unless they exist as the husband's property, at the time of his death; and though the rule in Virginia is otherwise (§ 294, *infra*), it is based on the language of statutes different from that now under consideration. And see also p. 450, *infra*, note 2, where it is argued that, even under the Virginia statutes above referred to, the husband may defeat his widow's dower in land he has contracted to purchase by a *rescission* of the contract in his lifetime. The same reason of policy would seem to permit a husband to deal as he pleases with a mere right of entry or action, regardless of his wife's contingent right of dower.

The only case in which § 2268 has been relied on in Virginia is *Chapman v. Chapman*, 92 Va. 537. It was there contended that when the vendee of land who has been put into possession, but has not received a deed, is in default in the payment of the balance of the purchase money, this gives the vendor a right of action to recover the land, and therefore his widow would be entitled to her dower under the statute. The purchaser was found not to have been in default; but the court said, even if he had

Dig. 64. And in some of the States seisin in law, even in the case of cultivated lands, is deemed sufficient, provided always there is no adverse possession to reduce it to a mere right of entry. Wms. R. P. 229, n. 2; 1 Bish. Mar. Wom. § 510; 8 Am. & Eng. Ency. Law (2d ed.) 512. In Virginia and West Virginia seisin in fact, actual or constructive, is necessary, except, perhaps, in the case of wild lands. *Carpenter v. Garrett*, 75 Va. 129; *Muse v. Friedenwald*, 77 Va. 57; *Fulton v. Johnson*, 24 W. Va. 95; *Seim v. O'Grady*, 42 W. Va. 77 (24 S. E. 995). And in Kentucky seisin in fact is necessary even in the case of wild lands. *Neely v. Butler*, 10 B. Monroe, 48; 2 Bl. Com. (Cooley's ed.) 128, n. 9. See *Malone v. McLaurin*, 40 Miss. 141 (90 Am. Dec. 320); *Bogy v. Roberts*, 48 Ark. 17 (2 S. W. 186; 3 Am. St. Rep. 211); *Jackson v. Johnson*, 5 Cowen (N. Y.), 74 (15 Am. Dec. 433, and note); 1 Washb. R. P., 182; 4 Kent Com. 30; 2 Min. Ins. (4th ed.) 124.¹

been, "that would not have given his vendor the right to re-enter and take possession until he had reasonable notice and opportunity to redeem his default." See § 67, *supra*, and cases cited. From this *dictum* it might be inferred that if the notice had been given, and the default had continued, then the right of the husband to recover the land (though not exercised during his life) would entitle his widow to dower therein. But if this be so, yet it is not believed that such a right, once accrued to the husband during coverture, would render the widow dowable at his death, notwithstanding the fact that the purchaser had afterwards paid the husband in full for the land, and received from him a deed of conveyance.

¹ SEISIN REQUIRED IN KENTUCKY FOR CURTESY.—As to *wild lands*, it is said by the Supreme Court of the United States in *Davis v. Mason*, 1 Pet. 503, 506 (a case which came up from Kentucky): "It is believed that the rigid rules of the common law have never been applied to a wife's estate in lands of this description. In the State of New York (8 Johns. Rep. 271), these rules have been solemnly repelled; and we know of no adjudged case in any of the States in which they have been recognized as applicable. It would indeed be idle to compel an heir or purchaser to find his way, through pathless deserts, into lands still overrun by

§ 291. **Dower When the Husband is a Joint Tenant or Tenant by Entireties.**—At common law the wife had no dower in land of which the husband was jointly seised with a third

the aborigines, in order to 'break a twig' or 'turn a sod,' or 'read a deed,' before he could acquire a legal freehold. It may be very safely asserted that had a similar state of things existed in England when the Conqueror introduced this tenure, the necessity of actual seisin, as an incident to the husband's right, would have never found its way across the Channel."

In *Davis v. Mason*, *supra* (decided in 1828), the Supreme Court of the United States professed to follow the law of Kentucky as to the seisin required for curtesy. But in *Neely v. Butler*, 10 B. Mon. 48 (decided in 1849), the Supreme Court of Kentucky rejected the view which had been taken by the Supreme Court of the United States as to the law of that State, and held that actual seisin was necessary to the husband's curtesy even in wild lands. (See above in text.) The general doctrine of Kentucky is thus laid down by Bennett, J., in *Sweeney v. Montgomery*, 85 Ky. 55 (2 S. W. 562): "It is well settled by repeated decisions of this court that a husband is not entitled to curtesy in the real estate of his deceased wife unless he has acquired the actual possession of such estate during her life. It is required of the husband to take actual possession of his wife's land as a condition precedent to his right of curtesy therein, for the purpose of strengthening her title to it, and to protect it from intrusion and hostile possession, which might, by its continuance, endanger her title. This being the reason of the rule, whenever its equivalent is complied with, the rule is complied with. For instance, if the guardian of the wife holds the possession of her land at the time of her death, then the reason of the rule is complied with, and the husband is entitled to curtesy in the land; and if a joint tenant with the wife [where the right of survivorship has been abolished] holds the friendly possession of the land at the time of her death, here his possession is her possession, and the reason of the rule is complied with. So if a trustee of the wife holds the possession of the land for the wife at the time of her death, here also the reason of the rule is complied with, and the husband is entitled to curtesy. Indeed, if any person at the death of the wife is seised of her land for her use, the reason of the rule is complied with, and the husband is entitled to curtesy." See also *Ellis v. Dittey*, 94 Ky. 620 (23 S. W. 366).

person; for, on the husband's death, the land belonged to the surviving joint tenant by the *jus accrescendi*, which as has been shown, was paramount to dower. See § 150, *supra*; also §§ 286, 287. But now in Virginia there is dower in land of which the husband is seised jointly with another who survives him, the *jus accrescendi* being abolished by statute (§ 151, *supra*).¹

¹ NO DOWER AT COMMON LAW WHEN HUSBAND JOINT TENANT WITH A THIRD PERSON.—In *Babbitt v. Day*, 41 N. J. Eq. 392 (5 Atl. 275), the law is thus laid down by Runyon, Ch.: "By the common law no title of dower attaches where the husband is seised of the land jointly with another or others. This is owing to the nature of the estate of joint tenants. The possibility, so long as the joint ownership subsists, that the estate of each tenant may be wholly defeated by the possibility of his dying in the lifetime of the other, or others, prevents the attaching of the right of dower in the wives of any of the tenants except the survivor. The estate which the husband must have to entitle his wife to dower is one in severalty or in common [or in coparcenary.] The unity of interest in joint tenancies (each tenant is seised *per my et per tout*) prevents the admission of a right of dower or curtesy except as to the estate of the survivor. On the decease of one joint tenant the survivor holds the whole property under and by virtue of the original grant, and holds no part of it in any wise under the decedent. 2 Cruise, Dig. 444. We have not in this State changed the law in respect to dower in such estates either by statute or legal adjudication."

Not only has the wife at common law no dower when the husband is at his death joint tenant of land with another who survives him, but she is even denied dower when the husband conveys during the coverture the land to a third person, thereby severing the joint tenancy. This is held in *Mayburry v. Brien*, 15 Peters, 21, and the reason is said to be that the husband's interest was divested and passed to the alienee *eo instanti* that it became dissevered from that of his joint tenant. 1 Bishop, Mar. Wom. § 305. This doctrine is well settled, but is disapproved in 1 Scribner, Dower (2d ed.) 336, where it is said: "As against the *survivor* [*i. e.*, the surviving joint tenant], it is plain that there can be no dower, because from the very nature of the estate, and by virtue of the original grant, the entire interest becomes absolutely vested in him on the death of the co-

Nor was there dower at common law when husband and wife were tenants by entireties, but on the death of the husband the whole land belonged to the wife. § 151, *supra*. The right of survivorship, however, between tenants by entireties was abolished in Virginia by statute taking effect July 1, 1850 (§§ 153, 154, *supra*), and from that time until May 1, 1888, there was dower in the husband's moiety when husband and wife were tenants by entireties, and the wife survived her husband. But by the Code of 1887 (taking effect May 1, 1888), tenancy by entireties was abolished in Virginia. § 153, *supra*, and note. For full discussion of tenancy by entireties, see 18 Am. Dec. 377-389, note to *Den. v. Hardenbergh*, 10 N. J. Law, 42.

The law as above laid down as to dower in joint estates and tenancies by entireties is, *mutatis mutandis*, also applicable to curtesy. 1 Bishop, Mar. Wom. § 503.

We shall now proceed to consider Dower and Curtesy septenant. The rule, however, as established goes much further than this, and not only denies dower against the survivor, but absolutely precludes it from attaching during the existence of the joint estate. . . . One consequence resulting from this rule is that if the husband sever the joint estate by conveying his share to a third person, the right of dower is thereby entirely defeated. Ordinarily any act which determines the joint tenancy during the lifetime of the husband entitles the wife to dower; but it is held that where the joint estate is severed by the alienation of the husband, the sole seisin acquired by him by virtue of the conveyance in instantaneous only, and passes from him by the same act by which he acquired it; and, therefore, that no right of dower attaches. Had a contrary doctrine prevailed, and dower been held to attach upon the joint estate, subject to be defeated only by survivorship, then upon the determination of the joint tenancy by the alienation of the husband, and the consequent destruction of the possibility of survivorship, the right of the wife would have become fixed, liable only to be defeated by her own act, or by her decease in the lifetime of her husband." Of course, the modern statutes abolishing the *jus accrescendi* between joint tenants does away with the injustice done the wife by denying her dower in the case put.

arately, though in some instances the same doctrines apply to both estates.

I. *Dower.*

§ 292. *Dower in Equitable Estates.*

(1) At common law there was neither dower nor curtesy in *uses*; but after the Statute of Uses, curtesy was allowed in such unexecuted uses as became *trusts* (see § 114, *supra*), but the dower was denied. This discrimination against dower was not based on any legal principle, but on practical considerations of expediency, as is explained in the note.¹

¹ DOWER DENIED IN TRUSTS.—In *D'Arcy v. Blake*, 2 Sch. & Lef. 387, 388, Lord Redesdale gives this explanation, which has met with general acceptance, of the anomalous distinction between dower and curtesy in trusts:

“The difficulty in which the courts of equity have been involved with respect to dower, I apprehend, originally arose thus. They had assumed, as a principle in acting on trusts, to follow the law; and, according to this principle, they ought, in all cases where rights attached on legal estates, to have attached the same rights upon trusts, and consequently to have given dower of an equitable estate. It was found, however, that in cases of dower, this principle, if pursued to the utmost, would affect the titles to a large proportion of the estates in the country; for that parties had been acting, on the footing of dower, on a contrary principle, and had supposed that by the creation of a trust the right of dower would be prevented from attaching. Many persons had purchased under this idea, and the country would have been thrown into the utmost confusion if courts of equity had followed their general rule, with respect to trusts, in cases of dower. But the same objection did not apply to tenancy by the curtesy, for no person would purchase an estate subject to tenancy by the curtesy without the concurrence of the person in whom the right vested. . . . Pending the coverture, a woman could not alien without her husband, and therefore nothing she could do could be understood by a purchaser to affect his interest; but where the husband was seised, or entitled in his own right, he had full power of disposing, except so far as dower might attach. And the general opinion having long been that dower was a mere legal right, and that as the existence

(2) In England, by the Act of 1833 (as to women married since January 1, 1834), dower is allowed in all equitable estates. 3 & 4 Will. IV., c. 105, § 2. The language of the English statute is as follows: "When a husband shall die beneficially entitled to any land for an interest which shall not entitle the widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy), then his widow shall be entitled in equity to dower out of the same land." See 1 Scribner Dower 399, and 665, Appendix.¹

of a trust estate previously created prevented the right of dower from attaching at law, it would also prevent [protect] the property from all claim to dower in equity, and many titles depending on this opinion, it was found that it would be mischievous in this instance to [adhere to] the general principle that equity should follow the law; and it has been so long and so clearly settled that a woman should not have dower in equity who is not entitled at law that it would be shaking everything to attempt to disturb the rule." See *Smith v. Adams*, 5 De G., McN. & G. 712, 720; 1 Scribner, Dower (2d ed.) 398; 2 Min. Ins. (4th ed.) 125.

¹ DOWER UNDER THE ENGLISH STATUTE OF 1833.—The following account of the effect of the Act of 3 & 4 Will. IV., c. 105, on Dower, is taken from *Williams*, Real Prop. (5th Am. ed.) 236: "With regard to women married since the 1st of January, 1834, the doctrine of jointures is of very little moment. For by the act of the amendment of the law relating to dower, the dower of such women has been placed completely within the power of their husbands. Under the act, no widow is entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will. . . . The husband may also, either wholly or partially, deprive his wife of her right to dower by any declaration for that purpose, made by him by any deed, or by his will. As some small compensation for these sacrifices, the act has granted a right of dower out of lands to which the husband had a right merely, without having had even a legal seisin; dower is also extended to equitable as well as legal estates of inheritance in possession except, of course, es-

§ 293. Dower in Equitable Estates in the United States.—

In 1 Scribner on Dower (2d ed.), p. 400, it is said: "In some States the rule of the common law excluding dower from the estate of the *cestui que trust* prevails. With the exception of Pennsylvania, this is supposed to be the case in all those States where that rule is not changed by statute. The following named States may be embraced in this class: Massachusetts, Maine, New Hampshire, Connecticut, Vermont, Georgia, Florida, Minnesota, Michigan, South Carolina, Wisconsin, Oregon, Delaware, and Arkansas. In the District of Columbia, also, before the Revised Code, the common law was held to be in force. But in many of the States the rule of the common law in this particular is greatly changed, and in others it is entirely abrogated. Thus where the equity of the husband is perfect and complete, and his interest is of such character that if it were a legal estate it would be subject to dower at common law, the right of the widow to be endowed thereof is recognized in the following States: Virginia, Kentucky, New Jersey, Pennsylvania, Alabama, and Mississippi. Under the present statute the rule is the same in the District of Columbia. So in New York, Maryland, North Carolina, Ohio, Indiana, Illinois, Iowa, Rhode Island, Tennessee, Missouri, and Kansas, dower is allowed in equitable estates. And it is not required in all of these States that the equity of the husband shall be complete, but in some of them the widow may claim dower, subject to prior equities or encumbrances, to the extent of the actual interest of the husband in the lands at the time of his death." See, also, 1 Washb. Real Prop. (5th ed.) 161, 163; 4 Kent. Com. (13th ed.) 44; 1 Bishop, Mar. Wom. § 285; 10 Am. & Eng. Ency.

tates in joint tenancy. The effect of the act is evidently to deprive the wife of her dower except as against the husband's heir at law. If the husband should die intestate, and possessed of any lands, the wife's dower out of such lands is still left for her support—unless indeed the husband should have executed a declaration to the contrary."

Law (2d ed.) 162, n. 2; 1 Stimson, Am. Statute Law, § 3212.¹

For discussion of the general doctrine in the United States that there is no dower in an equitable estate unless the husband dies possessed thereof, so that an alienee by the husband's sole deed takes a title paramount to dower, see 1 Scribner, Dower, 442; 10 Am. & Eng. Ency. Law, 163, note 1. And see *Smallridge v. Hazlett* (Ky.) 66 S. W. 1043; *Rabbitt v. Gaither*, 67 Md. 94 (8 Atl. 744); *McRae v. McRae*, 78 Md. 270 (27 Atl. 1038). For contrary doctrine in Virginia, see § 294, *infra* and note.²

¹ DOWER IN EQUITABLE ESTATES IN THE UNITED STATES.—In the above enumeration of States, Arkansas, Connecticut and New Hampshire are named as States in which the common law rule excluding dower from the estate of the *cestui que trust* prevails. And see 1 Scribner, Dower, p. 414. But it seems that the rule in them is now otherwise. See *Kirby v. Van Treece*, 26 Ark. 368; *Hall v. Hall*, 70 N. H. 47 (47 Atl. 79); *Greene v. Huntington*, 73 Conn. 106 (46 Atl. 883). For recent cases as to dower in equitable estates, see *Everitt v. Everitt*, 71 Ia. 221 (32 N. W. 273); *Tink v. Walker*, 148 Ill. 234 (35 N. E. 765); *Stephens v. Leonard*, 122 Mich. 125 (80 N. W. 1002); *Askew v. Askew*, 103 N. C. 285 (9 S. E. 646); *In re Ames*, 22 R. I. 54 (46 Atl. 47).

² DOWER WHEN HUSBAND RESCINDS HIS CONTRACT OF PURCHASE.—Under the general rule which denies dower to the widow of a purchaser of land under an executory contract unless his equity at his death be complete, it would seem to follow necessarily that, until the full payment of the purchase money no dower right could attach, and a rescission of the contract would effectually and finally defeat dower. This seems to have been the ground of the decision on this point in *Wheatley v. Calhoun*, 12 Leigh (Va.) 264, 277, where it is said: "The appellee [widow of Calhoun] is not entitled to dower in the 221 acres of land her husband contracted to purchase of Wheatley by the articles of October, 1822, the contract therefor never having been carried into effect, and the same having been rescinded and abandoned while it was yet wholly executory, and before the payment of the purchase money was completed, or the legal or equitable possession of the seisin of the land acquired by the purchaser." And it was held that 1 Rev. Code, ch. 99, § 31 (now § 2429 of Code

For discussion of the doctrine in many of the States that there is no dower in an equitable estate unless it is "perfect"

1887, set out in full in § 294, *infra*) did not give the purchaser's widow dower under these circumstances.

The general rule, also, which denies dower in an equitable estate unless the husband dies entitled thereto would seem also to enable him, though the equity had become complete, to defeat the widow's dower therein by a rescission in his lifetime. Thus in 1 Scribner, Dower, p. 444, it is said: "The rule which permits the husband to alienate his equity free from incumbrance of dower also permits him to agree to a rescission of the contract." For this *Wheatley v. Calhoun*, *supra*, is cited (though the ground of the decision seems to have been the incompleteness of the equity), and *Owen v. Robbins*, 19 Ill. 549, where it is said: "The contract until it is executed is only inchoate, and may be cancelled by the parties; or like any chose in action may be assigned so as to pass the equitable interest in the agreement to the assignee. We have been unable to find any case which holds that the widow is dowable of lands where the husband has assigned a contract of purchase."

Wheatley v. Calhoun, *supra*, was decided in 1841, when the law of Virginia had not been settled, either as to the doctrine of "complete equity," or as to the effect of the husband's assignment of his contract of purchase. But as is stated in § 293, and as is more fully shown in § 294 *infra*, it is now held in *James v. Upton*, 96 Va. 296 (decided in 1898) that the purchaser's equity need not be complete to entitle his widow to dower, nor will an assignment of his contract of purchase defeat her dower. And this is held upon the construction of the very statute (now § 2429 of the Code), which was held in *Wheatley v. Calhoun*, *supra*, not to prevent rescission of the contract while the equity remained incomplete.

The question arises, under the Virginia law as now construed: does the rescission of a contract of purchase defeat the dower of the purchaser's widow? Since in this State the husband cannot defeat his wife's dower in such equity, though he assigns it while incomplete to a purchaser for value, unless she unites in the deed, and as both the grounds on which rescission has been held to prevent the attachment of dower thus fail in Virginia, it may be contended that the widow can claim her dower in spite of her husband's rescission. It is believed, however, that *Wheatley v. Calhoun* (which is not referred to in *James v. Upton*) is still law in Virginia; and that it was not intended by § 2429

or "complete" during the coverture, see 1 Scribner, Dower, pp. 436-442; 10 Am. & Eng. Ency. Law (2d ed.) 104. And see *Walters v. Walters*, 132 Ill. 467 (23 N. E. 1120); *Tink v. Walker*, 148 Ill. 234 (35 N. E. 765); *Howell v. Jump*, 140 Mo. 441 (415 S. W. 976). For contrary doctrine in Virginia see § 294, *infra*, and note.

§ 294. **Dower in Equitable Estates in Virginia.**—In Virginia, dower was given in equitable cases by the Act of 1785, c. 62 (12 Hen. Stat. 157; 1 Rev. Code Va. 370), taking effect January 1, 1787. This is the first statute giving dower in equitable estates adopted in the United States (1 Scribner, Dower, 403); and, as it appears in Code of Va. (1887) § 2429, it reads as follows: "Where a person to whose use, or in trust for whose benefit, another is seised of real estate, has such inheritance in the use or trust as, if it were a legal right, would entitle such persons' husband or wife to curtesy or dower thereof, such husband or wife shall have curtesy or dower of the said estate." See *Claiborne v. Henderson*, 3 H. & M. 322.

On December 6, 1792, dower in equitable estates was also conferred by § 1 of "An act to reduce into one all acts and

of the Code, nor by § 2269 (as to which see § 294, *infra*), to prevent the exercise by a husband of the right of rescission of an executory agreement to purchase land. While her dower right is contingent, this is a risk which it must run. Nor does it follow that because the husband cannot, as held in *James v. Upton*, *supra*, defeat his widow's dower by assignment of his contract of purchase, that therefore he cannot destroy her contingent dower by rescission. After an assignment, the contract remains in existence, and is only transferred to another; and the widow (who has not united in the transfer) claims dower in the equity created thereby, as she would in any other equitable estate of which her husband was possessed during the coverture; but after rescission, the contract is at an end, and the equity it created ceases to exist. To allow a wife to prevent rescission by conferring on her an indefeasible right of dower by virtue of the executory contract of her husband would seem against public policy, and injurious to the best interests of all concerned in the transaction.

parts of acts relating to dower," which, as re-enacted in the Code of 1887, § 2267, reads as follows: "A widow shall be endowed of one-third of all the real estate whereof her husband, *or any other to his use*, was, at any time during the coverture, seised of an estate of inheritance, unless her right to such dower shall have been lawfully barred or relinquished."

The above statutes have been held in Virginia to entitle a widow to dower in her husband's equitable estate of which he was possessed during the coverture, whether by way of express or merely constructive trust; and in the latter case (as when the husband contracts to buy land), whether or not the trust is complete at his death by full payment of the purchase-money. Dower also under these statutes attaches to equitable estates to which the husband was entitled during the coverture, although alienated by him in his lifetime, so that he does not die possessed thereof.¹ The statutes are

¹ DOWER IN EQUITABLE ESTATES IN VIRGINIA.—As is stated above, it is settled under the Virginia statutes, contrary to the general rule in the United States (see § 293, *supra*), that it is not necessary, in order to entitle the widow to dower in her husband's equitable estate of inheritance, either (1) that his equity should be "complete" or "perfect"; or (2) that he should *die entitled* thereto, if he was possessed thereof during the coverture, and disposed of it in his lifetime without the wife's concurrence.

Thus in *James v. Upton*, *supra*, it is said: "We are of opinion, therefore, that a husband who enters into an agreement for the purchase of land, takes possession of it and pays part of the purchase price, is beneficially seised of the land to the extent that he has paid the purchase price, although he has not acquired the legal title; and that his widow is entitled to dower in the land, subject to the lien on it for the unpaid purchase price, whether he die possessed of the land, or has aliened it during the coverture without her concurrence in the mode prescribed by law."

This decision is placed entirely on § 2429 of the Code of Va., quoted above in § 294. But as to the right of a widow to dower in an equitable estate of the husband, as against an alienee of the husband claiming under a deed in which she did not join, this would seem to be clear under Code of Va. § 2267 (also

also held to confer a right of dower on the widow of a mortgagor in the equity of redemption when the mortgage is paramount to the dower in the land. *Heth v. Cocke*, 1 Rand.

quoted in § 264 above) which declares in terms that, "a widow shall be endowed of one-third of all the real estate whereof her husband, or *any other to his use*, was, *at any time during the coverture*, seised of an estate of inheritance, unless her right to such dower shall have been lawfully barred or relinquished." For the doctrine of constructive trust in favor of the purchaser of land, who has not received a conveyance, see 2 Story, Eq. Jur. § 1212; Bisph. Eq. § 95; 1 Bishop, Mar. Wom. § 281.

As to the husband's entry into possession of land purchased (which was a fact in *James v. Upton*, *supra*), it would seem that this is immaterial except where, in the absence of a written contract, it becomes necessary, in order to render the contract binding, to rely upon the doctrine of part performance of the verbal contract—a doctrine which in the case of *sales* of land is still recognized in Virginia as between the parties; though by Code Va. 1887, § 2463, taking effect May 1, 1888, such a verbal contract, if made "for the conveyance or sale of real estate, or a term therein of more than five years," is declared "void, both at law and in equity, as to purchasers for valuable consideration without notice, and creditors." See 1 Va. Law Reg. 682, note.

It is the general doctrine that equity will enforce by specific performance a verbal gift of land, when by virtue of such gift the donee is induced to enter on the land and make improvements. See *Neale v. Neales*, 9 Wall 1; *Burkholder v. Ludlam*, 30 Gratt. (Va.) 255; *Halsey v. Peters*, 79 Va. 60; *Dozier v. Matson*, 94 Mo. 328 (7 S. W. 268). And in *Young v. Young*, 45 N. J. Eq. 27 (16 Atl. 921), it is held that, under such circumstances, the widow of the donee is entitled to dower. But now in Virginia, by Code of 1887, § 2413 (taking effect May 1, 1888), the doctrine of equity as laid down above as to verbal *gifts* of land is abrogated, the statute declaring: "Nor shall any right to a conveyance of such estate or term in land [*i. e.*, "estate of inheritance or freehold, or for a term of more than five years"] accrue to the donee of the land, or those claiming under him, under a gift or promise of gift of the same hereafter made and not in writing, although such gift or promise be followed by possession thereunder, and improvement of the land by the donee or those claiming under him." See Report Va. State Bar Ass'n, 1891, Address of Judge Burks, pp. 116, 117.

(Va.) 344; *Wilson v. Davisson*, 2 Rob. (Va.) 384; *James v. Upton*, 96 Va. 296 (31 S. E. 255).

§ 295. What Ownership of the Husband Entitles the Wife to Dower.

(1) *The ownership of the husband must be beneficial, and not merely of a naked legal title in trust for another.* Hence if the husband is a mere trustee or a mortgagee his widow is not dowerable. 1 Bishop, Mar. Wom. § 278; 1 Scribner, Dower, 409, 477; *McKneely v. Terry*, 61 Ark. 527 (33 S. W. 953); *King v. Bushnell*, 121 Ill. 656 (13 N. E. 245); *McDaniel v. Large*, 55 Ia. 312 (7 N. W. 632); *Miller v. Miller*, 148 Mo. 113 (49 S. W. 852); *Pruitt v. Pruitt*, 57 S. C. 155 (35 S. E. 485).¹

¹ WIDOW OF TRUSTEE NOT ENTITLED TO DOWER.—In 1 Scribner, Dower, 591, it is said: "Upon this principle, if a man make a contract for the sale of his land, and afterwards, and before conveyance made, marry, he is regarded in equity as a trustee for the purchaser; and if the conveyance be made during the coverture in execution of the contract, the purchaser takes the estate discharged of dower. The rule is the same if the husband die without having conveyed the land, and a specific performance of the contract is enforced against his heirs." See 1 Bishop, Mar. Wom. 279; 10 Am. & Eng. Ency. Law 132.

Thus in *Chapman v. Chapman*, 92 Va. 537, it is held that the widow of the vendor of real estate is not entitled to dower in the lands of the husband of which he was seised during the coverture when it appears that the husband sold the land before marriage, put the vendee in possession and received part of the purchase money, and after the marriage, on the receipt of the residue of the purchase money (as the court presumed), conveyed the land to the vendee by his sole deed. And in *Burdine v. Burdine*, 98 Va. 515, 523, the court says: "The title of a widow to dower in her husband's land, being derived through the husband, is liable to be defeated by every subsisting claim or incumbrance existing before the inception of her right, and which would have defeated the husband's seisin. It is well settled that if a man before marriage enters into a contract for the sale of land upon certain terms and conditions, and the terms and conditions are performed, his widow is not entitled to dower in the land, although the husband dies without making a conveyance.

(2) *The husband must have had at some time during the coverture the immediate estate of freehold.* The husband's

This is on the principle that the husband is regarded in equity as a trustee for the purchaser."

In *Chapman v. Chapman*, *supra*, it was inferred from the circumstances that the whole purchase money was paid to the husband during the coverture; and in *Burdine v. Burdine*, *supra*, the woman who claimed under the husband's contract had in his lifetime performed all the terms and conditions. In *Chapman v. Chapman*, therefore, as the husband had made a conveyance to the purchaser, there did not remain in the husband at the time of his death any interest in the land, legal or equitable, in which the widow could claim dower. And in *Burdine v. Burdine*, though the legal title remained in the husband at the time of his death, he (and his heir after him) was a mere trustee, without beneficial interest. But how as to the vendor's widow's dower, when, though the contract is made before marriage, the purchaser continues in default during the coverture (a part of the purchase money remaining unpaid), and no conveyance of the land has been made to him in the lifetime of the husband?

This question arose in *Pulling v. Pulling*, 97 Mich. 375 (56 N. W. 765), where the facts were as above supposed; and it was held that, under these circumstances, the widow of the vendor is dowerable of the unpaid purchase money, but not of the land itself. The court said:

"It is insisted on behalf of the estate that, at the time of the marriage, Henry P. Pulling [the husband] held the legal title only in trust for the purchasers. The cases cited, however, in which this has been asserted, and the right to the dower denied, are, without an exception, cases where the vendee has paid the entire consideration. . . . In the present case it is not sought to subject the purchaser's interest, nor the interest held by the husband at the time of the marriage, to dower. The only claim made is that the interest held at the time of his death shall be regarded as realty. It is purely a question of the quality of that interest. The husband died seised not of the legal title alone, but of the legal title with a beneficial interest aggregating \$45,000 [*i. e.*, the amount of the unpaid purchase money]. . . . In the present case the wife's dower has been defeated only so far as the amount due upon the contracts has been reduced by payment. Even though a trust be implied, it is one coupled with a beneficial interest, and it is well settled that the wife of a trustee is entitled to dower commensurate with the husband's in-

estate in possession may be for his life only; but in that case it is necessary that the husband should also have the inheritance in remainder, without any *vested* estate of *freehold* in another intervening between the husband's life estate and his inheritance. The intervention, however, of a vested remainder *not of freehold*, or of a freehold *contingent* remainder, will not prevent the husband's estate from being such as to entitle his widow to dower therein. Thus, if there is a deed "To B for life, remainder to C for life, remainder to B and his heirs"; here the widow of B has no dower unless C dies before B, for C has a *vested freehold estate*. But if the deed is "To B for life, remainder to C for ten years, remainder to B and his heirs," or "To B for life, remainder to the unborn son of C for life, remainder to B and his heirs," in both cases B's widow has dower. For in neither case is the estate intervening between B's life estate and his inheritance a *vested freehold remainder*. But in the last example, if C have a son in the lifetime of B, then the remainder will vest, and this defeats dower. And now in Virginia the remainder to the unborn son of C can vest after B's death (for by the Virginia statute a contingent remainder shall in no case fail for want of a particular estate to support it, § 205, *supra*); and in this case also it is presumed that dower would be defeated. See 1 Scribner, Dower, 231, 246; 1 Bish. Mar. Wom. §§ 274, 314; 10 Am. & Eng. Ency. Law, 134; 1 Washb. Real Prop. 206, note; *House v. Jackson*, 50 N. Y. 161, 165; *Trumbull v.*

terest. . . . We discover no difficulty as respects the admeasurement. Dower cannot be assigned on the lands in question, but a sum in lieu of dower can be awarded." See *Waller v. Waller*, 33 Gratt. 83.

For the general doctrine that a widow's dower is subject to all equities arising out of contracts of the husband before the marriage, see *Beckwith v. Beckwith*, 61 Mich. 315 (28 N. W. 116). That dower is paramount to a contract and conveyance made by the husband alone after marriage, see *McCreary v. Lewis*, 114 Mo. 582 (21 S. W. 855).

Trumbull, 149 Mass. 200 (21 N. E. 366); *Null v. Howell*, 111 Me. 274 (20 S. W. 24); *Rhode Island, &c., Trust Co. v. Harris*, 20 R. I. 408 (39 Atl. 750).¹

§ 296. **Dower in Reversions and Remainders.**—As has been seen (§ 295) it is essential to the wife's right of dower that the husband should be seised, at some time during the coverture, of the immediate estate of freehold in the land. It follows from this, as a corollary, that there is no dower in a

¹ EFFECT ON DOWER OF A CONTINGENT FREEHOLD REMAINDER INTERVENING BETWEEN THE HUSBAND'S FREEHOLD AND HIS INHERITANCE. —This has been considered a question of some difficulty, and Mr. Washburn has expressed the view that the interposition of the contingent remainder in the above case, "prevented the inheritance of the husband from being an entire one, which is necessary in order to give dower." 1 Washb. R. P. 206. The better opinion, however, is believed to be that of Scribner, who lays down the law as follows (1 Scribner, Dower, 239): "It is, as we have already seen, a fundamental principle in the law of dower that the husband must have the immediate freehold and inheritance *simul et semel* [at once and together]. If, therefore, the immediate contingent interest operates to prevent the life estate of the husband from merging in the inheritance, and thus keeps the two estates disjoined, it is difficult to understand how, upon principle, the right of dower can attach so long as there is a continuing possibility that the contingent estate may vest. It would seem, however, to be the result of the adjudged cases, and the concurring opinion of many of the writers on the law of real property, that where a contingent estate of freehold is interposed between a limitation to the husband for life and a subsequent remainder to his heirs [supposing that the Rule in *Shelley's Case* has not been abolished], the remainder is executed in possession in the tenant for life *sub modo*; or in other words, that the estates are consolidated or united *until* the happening of the contingency; but with the qualification annexed to such consolidation that, if the contingency happen, they shall again divide, and resume the character of several or distinct estates, so as to let in the estate limited on that contingency. And it appears to be the prevailing opinion that upon this union of the freehold and inheritance *sub modo*, a right of dower attaches, subject to a liability to be divested upon the happening of the contingency, and the consequent vesting of the contingent estate."

reversion or remainder expectant on a life estate, unless the life-tenant dies in the lifetime of the husband; for in such case the life-tenant has the seisin, and not the husband. 1 Scribner, Dower, 229, 321; 1 Bishop, Mar. Wom. § 273; 10 Am. & Eng. Ency. Law, 134; *Durando v. Durando*, 23 N. Y. 331; *Northcutt v. Whipp*, 12 B. Monroe, 65; *Malone v. McLaurin*, 40 Miss. 141 (90 Am. Dec. 320); *Kenyon v. Kenyon*, 17 R. I. 539 (24 Atl. 787); *Watson v. Watson*, 150 Mass. 84 (22 N. E. 438); *Hill v. Pike*, 174 Mass. 582 (55 N. E. 324); *Sammis v. Sammis* (R. I.) 51 Atl. 105; *Young v. Morehead*, 94 Ky. 608 (23 S. W. 511); *Killett v. Shepard* (Ill.), 34 N. E. 254; *Payne v. Payne*, 118 Mo. 174 (24 S. W. 781); *Garrison v. Young*, 135 Mo. 203 (36 S. W. 662); *Von Arb v. Thomas*, 163 Mo. 33 (63 S. W. 94). And, *mutatis mutandis*, the same doctrine applies to curtesy. *Webster v. Ellsworth*, 147 Mass. 602 (18 N. E. 569); *Todd v. Oviatt*, 58 Conn. 174 (20 Atl. 440); *Martin v. Traill*, 142 Mo. 85 (43 S. W. 655); *Cox v. Boyer*, 152 Mo. 576 (54 S. W. 467); *Ferguson v. Tweedy*, 43 N. Y. 543.

On the other hand, the rule is that there is a dower in a reversion or remainder expectant on a *term of years* created by the husband before the marriage; for, notwithstanding the term, the husband is *seised*. While the term lasts, however, it is unaffected by the right of dower; though if a rent be reserved to the husband, the widow is entitled to one-third of it as incident to her estate. But if the term was created by the husband before marriage without reserving rent, or if the husband's inheritance is expectant on a term given by his grantor to the tenant, in either case the wife, though entitled to dower in the land, will nevertheless take it subject to the term, with a *cessat executio* during the term, and she can neither enter nor receive any profits until it has terminated. This, if the term be of long duration, virtually deprives her of her dower. 1 Scribner on Dower, 230; 1 Bishop, Mar. Wom. § 273; 10 Am. & Eng. Ency. Law, 134;

3 Bac. Abr. 201; *Weir v. Humphries*, 4 Ired. Eq. (N. C.) 264; 1 Washb. Real Prop. 204.¹

§ 297. Dower When Husband has Reversion on Which Rent is Reserved.—These three cases should be considered:

(1) Lease by B before marriage for a term of years, reserving rent during the term. B marries F, and dies during the term. F shall be endowed of a third part of the reversion by metes and bounds, and receives the third part of the rent, and execution shall not cease during the years. Of course, however, she does not oust the tenant. Co. Litt. 32 a; *Herbert v. Wren*, 7 Cranch 370; 1 Scribner on Dower,

¹ DOWER IN REVERSIONS AND REMAINDERS.—In the above discussion, it is assumed that the husband becomes a reversioner after a life estate by his conveyance, before his marriage, of the land to a third person for life. For if the conveyance was made by the husband after his marriage, the title to dower would have already attached before the conveyance, and in the language of Kent (4 Com. 13th ed. 39), “the wife is dowable of the land, and defeats the lease [for life] by title paramount.” When the husband is a remainderman—as, for example, when X conveys to A for life, remainder to B (husband) and his heirs—it is immaterial whether this conveyance is made by X before or after B’s marriage; for in neither case would B have the immediate freehold, unless A died before B. It follows also, when a husband is the owner of a reversion or remainder expectant on a life estate, that he can always defeat his wife’s dower therein by alienating his reversion or remainder during the continuance of the life estate. 1 Scribner, Dower, 605; 10 Am. & Eng. Ency. Law, 134, note 3.

As to a lease for years made by the husband of his land during the coverture, the general rule is, as stated by Scribner (1 Scribner, Dower, 604), that “all charges or derivative interests, created by the husband subsequent to the attachment of the wife’s right [of dower] are voidable as to that part of the land which is recovered in dower.” And he quotes Park on Dower, 237, 238, as follows: “If tenant in fee-simple take a wife, and then make a lease for years and dieth, the wife is endowed; in this case she shall avoid the lease, but after her decease the lease shall be in force again.” See, also, 1 Scribner, 377; 2 Id. 775-’6.

230, 377; 1 Bish. Mar. Wom. § 273; 2 Min. Ins. (4th ed.) 151.

(2) Lease by B before marriage to C for life, reserving rent during the term. B marries F, and dies during the life of C. F has dower neither in the land nor in the rent. Not in the *land* because B was not *seised* during the coverture; nor in the *rent* reserved, because B had not in it an estate of inheritance. *Blow v. Maynard*, 2 Leigh, 30; *Cocke v. Phillips*, 12 Id. 248. The rent in such cases passes exclusively to the heir as incident to the reversion. 1 Scribner on Dower, 373.

(3) Gift by B before marriage to C in tail, reserving rent. B marries F and dies. Here F has dower in the rent, because it is a rent *of inheritance*. Co. Litt. 32 a. But there is no dower in the land, for B had not the immediate estate of freehold. And on the death of C without issue, the rent reserved becomes extinct, and of course dower therein ceases. But if a rent charge in tail be *granted*, issuing out of land, and the tenant in tail of the rent dies without issue, his widow shall nevertheless have dower. 1 Scribner on Dower, 373; *ibid*, 374; § 55 *supra*; § — *infra*.

§ 298. **No Dower Out of Dower.**—In connection with the subject of dower in reversions expectant on a life estate, the maxim should be considered which forbids dower to be assigned out of dower—*dos de dote peti non debet*. The meaning, of course, is that when, under the circumstances stated below, land has been assigned to one widow, no dower in such land can be had by another. And no reason and authority, *mutatis mutandis*, the same doctrine applies to curtesy.

Let there be grandfather (G F), father (F), and son (S). Also the wife of the grandfather (G M), and the wife of the father (M). Suppose G F and F dead, and both the widows, G M and M living. Land has descended from G F to F, and from F to S, who is living, and must assign dower to both the widows. Now the maxim above teaches that if

one-third of the land is assigned to G M as her dower, then M can never have dower in that third, not even after the death of G M, because that would be to give her *dower out of dower*, which the law forbids. But in order that the maxim may apply two things must concur: 1. The land must *descend* from G F to F; 2. G M must have her dower *actually assigned* her, before M receives dower. 1 Scribner on Dower, 324, 333; 1 Bishop, Mar. Wom. 275; 8 Am. & Eng. Ency. Law (2d ed.) 511; 10 Id. 135; 2 Min. Ins. 128; 1 Tho. Co. 574; *Blow v. Maynard*, 2 Leigh (Va.) 29; *Durando v. Durando*, 23 N. Y. 331; *Safford v. Safford*, 7 Paige Ch. 259 (32 Am. Dec. 633); *Matter of Cregier*, 1 Barb. Ch. 598 (45 Am. Dec. 416); *Baker v. Baker*, 167 Mass. 575 (46 N. E. 391); *Carter v. McDaniel*, 94 Ky. 564 (23 S. W. 507); *Null v. Howell*, 111 Mo. 273 (20 S. W. 24).

The reason, then, that M can have no dower out of G M's dower, is, that as to the one-third assigned G M for life, the husband of M was *never seised at any time during the coverture*. As to that one-third, his estate was a reversion expectant on a freehold, in which we have seen there can be no dower. The explanation of this is to be found in the doctrine, already alluded to (§ 288, *supra*), by which a widow, when dower is assigned her, is deemed *in*, by and under her husband, as if she had been enfeoffed by him at the moment of his death. The effect is to *break the descent* of the dower lands to the heir, to whom only a reversion in them, after the widow's life estate, descends. And though the heir of G F should enter on all the lands, and (as F does in the case before us) die without having assigned dower to his mother (G M), yet when his son (S) assigns her dower, the doctrine applies, and the grandmother is *in* as if enfeoffed by her husband, and her seisin relates back and takes effect from the time of his death. *Reynolds v. Reynolds*, 5 Paige 161; 1 Cruise Dig. 200; Prest. Est. 550-5; 2 Scribner, Dower, 82.

The doctrine of *no dower out of dower* only applies after

assignment of dower to the elder widow (G M). If she has dower first assigned her, then the younger widow can never be endowed of the elder's dower. But if the younger widow is first endowed of the whole land, though she will yield to the elder's superior right when subsequently endowed, and be confined during the elder's life to dower in two-thirds of the land, yet on the death of the elder widow, the younger shall be restored to her dower in the whole. The ground for this *diversity*, though explained by Lord Coke, is not very satisfactory. Co. Litt. 31 b; 1 Scribner on Dower, 326; 1 Bish. Mar. Wom. § 277.

The reason of the maxim *dos de dote* requires that the land should come to the father by *descent* from the grandfather, through a *devise*, which operates only at the death of the grandfather, is considered, in this connection, equivalent to descent. *Robinson v. Miller*, 2 B Monroe, 284; 1 Scribner, Dower, 330. For if the grandfather had actually enfeoffed the father, then the latter would have had seisin in the former's lifetime, which could not have been annulled by the relation back of the grandmother's seisin to the death of her husband. 1 Scribner on Dower, 331; 1 Bish. Mar. Wom. § 276; 4 Co. 122 a.

When a husband sells land without the concurrence of his wife, and both grantor and grantee die leaving widows, the widow of the grantor, having the elder title in dower, is endowed of one-third of the whole land, and the widow of the grantee of one-third of the remaining two-thirds. But on the death of the grantor's widow, the widow of the grantee is let in to her full right of dower in the whole land. 4 Kent's Com. (64); 1 Scribner on Dower, 330; Reeve's Dom. Rel. 58; *Dunham v. Osborn*, 1 Paige 634; 10 Am. & Eng. Ency. Law, 136.

§ 299. Dower in Encumbered Land.—If the encumbrance existed before the marriage, or if the land comes to the husband already encumbered by a vendor's lien or otherwise, or if the encumbrance is created after marriage *with*

the wife's concurrence, it is paramount to dower; but dower is at common law superior to any encumbrance created *after marriage* by the *sole act* of the husband, if the land has once vested in the husband subject to dower. Thus, if the encumbrance is by mortgage, and is not paramount to dower, the widow has her full dower in the land itself; but if the mortgage is paramount to dower, the widow is dowable of the equity of redemption only.¹ *Heth v. Cocke*, 1 Rand. (Va.) 344; *Iaeger v. Bossieux*, 15 Gratt. (Va.) 83, 105 (dower against mechanic's lien); *Culbertson v. Stevens*, 82 Va. 406; *Alexander v. Byrd*, 85 Va. 690; *Ficklin v. Rixey*, 89 Va. 832; *Offield v. Davis* (Va.) 40 S. E. 910; *Martin*

¹ ENCUMBRANCES PARAMOUNT TO DOWER.—In *James v. Upton*, 96 Va. 296 (31 S. E. 252), it is said: "In this State one of the common methods of securing payment of the purchase price of land, when credit is given for all or a portion of the price, is for the vendor to convey the land to the vendee, and expressly retain a lien thereon in the conveyance [see C. V. § 2474; p. 473, *infra*, note], to secure the payment of the unpaid purchase price. Another mode is for the vendor to enter into an executory contract with the vendee for the sale of the land, and to retain the title to secure the payment of the unpaid purchase price. If the first method be followed [where the vendor conveys the land], and before the vendee has paid the entire purchase price, he die, or alien the land without his wife's uniting with him in the manner prescribed by law, there can be no question that his widow would be entitled to dower in the land, subject to the lien upon it for unpaid purchase money. If the last method be adopted [where the vender retains title], and the husband [vendee] die, or alien the land under like conditions, his widow must necessarily have the same right of dower in the land as in the other case mentioned, unless we disregard the plain meaning of § 2429 [see § 288, *supra*]. His beneficial interest in the land in each case is precisely the same. He is the owner of the land, subject to the incumbrance upon it for the unpaid purchase price. The only difference is that in one case he has the legal title, and in the other the vendor holds the legal title in trust for him, subject to the lien." See *Building, etc., Co. v. Fray*, 96 Va. 559 (32 S. E. 58).

v. *Smith*, 25 W. Va. 579; *Roush v. Miller*, 39 W. Va. 638 (20 S. E. 663; *Blair v. Mounts*, 41 W. Va. 706 (24 S. E. 620); *Porter v. Lazear*, 109 U. S. 84 (dower against assignee in bankruptcy); *Sarver v. Clarkson*, 156 Ind. 316 (59 N. E. 933); *McClure v. Fairfield*, 153 Pa. St. 411 (26 Atl. 446); *Seibert v. Todd*, 31 S. C. 206 (9 S. E. 822; 4 L. R. A. 606, and note); *Miller v. Farmers Bank*, 49 S. C. 247 (61 Am. St. Rep. 821).¹

§ 300. **Purchase-Money Mortgage.**—When A sells land on credit to B, and conveys it to B by deed, and B, as a part of the same transaction, mortgages the land to A to secure the purchase-money, such mortgage is called a purchase-money mortgage. 24 Am. & Eng. Ency. Law, 466. Its peculiarity is that, though the wife of B does not unite with him in the mortgage, she is nevertheless not dowerable of the land itself, but only of the equity of redemption after the payment of the mortgage. The reason is that as the deed to B and the mortgage by B are, by supposition, parts of one transaction, the seisin of B is transitory only; *i. e.*, he does not take the land beneficially even for an instant, but only as a trustee to execute the mortgage; and the effect is the

¹ ENCUMBRANCE CREATED AFTER MARRIAGE, BY SOLE ACT OF HUSBAND, MADE BY STATUTE PARAMOUNT TO DOWER.—As to the lien for quotas of the Mutual Assurance Society of Virginia, which, though the policy of insurance be taken out by the husband after marriage, is by statute made paramount to the widow's dower, see *Shirley v. Mutual Assurance Society*, 2 Rob. (Va.) 705. And in *Mutual Assurance Society v. Stone*, 3 Leigh (Va.) 218, it was held that this lien attaches to and follows the property into the hands of a purchaser for value without notice. But see now Acts Va. 1899-1900, c. 421, p. 446, requiring recordation of this lien in order to be valid against purchasers for valuable consideration without notice.

same as if the land had come to him with a vendor's lien or other encumbrance paramount to dower already on it.¹

¹ TRANSITORY SEISIN.—In 2 Bl. Com. 132, it is said: "The seisin of the husband for a *transitory instant only*, when the same act which gives him the estate conveys it also out of him again (as when by a fine land is granted to a man, and he immediately renders it back by the same fine), such a seisin will not entitle the wife to dower; for the land was merely *in transitu*, and never rested in the husband, the grant and render being one continued act. But if the land abides in him for the interval of but a *single moment*, it seems that the wife shall be endowed thereof."

It will be seen that Blackstone contrasts seisin for a "transitory instant" with seisin for a "single moment"—the latter being sufficient for dower, while the former is not—and this, no doubt, has led some writers to distinguish, in regard to time, *transitory* (or instantaneous) seisin on the one hand, and a *momentary* seisin on the other. But it is manifest from Blackstone's own statement that the real distinction intended is not as to the *duration* of the husband's seisin, but as to its *character*. When "transitory," it "never rested in the husband"; when momentary "it abides in him"; *i. e.*, in the one case he receives it as a conduit merely to transfer it to another, in the other he receives it beneficially, though it may remain with him but for a moment. It could be wished that the use of the term "instantaneous" (which is sometimes used in one sense and sometimes in another, though usually as the equivalent of "transitory") could be avoided, leaving "transitory" to express (as the word implies) seisin received for an ulterior purpose, and "momentary" to express any seisin, however brief, if only it be beneficial.

The purchase-money mortgage as explained above is a good example of a *transitory* seisin. This prevents dower in the land. But now when there is dower in an equity of redemption, the widow has dower in the surplus after payment of the mortgage, for to this extent the husband does take beneficially. When, however, B receives the title to land for the sole purpose of passing it over to C, B's widow would be precluded from dower altogether, as he would be in effect a mere trustee for C. *McCauley v. Grimes*, 2 Gill & J. (Md.) 318, 324; 1 Scribner, Dower, 273, 278; 2 Min. Ins. 146.

An excellent example of a *momentary* seisin is found in the case of *Broughton v. Randall*, Noy, 64, which is thus stated and explained in 1 Roper H. & W. 373: "A father was tenant for life, re-

In order that the deed and mortgage may constitute one transaction there must be either (1) an agreement when the deed is made that the vendee shall execute the mortgage or (2) the execution of the mortgage must be on the same day with the deed. In the former case, when an express agreement is proved, the postponement of the actual execution of the mortgage will not destroy the unity of the transaction. *Wheatley v. Calhoun*, 12 Leigh (Va.) 264. But in the latter, in absence of an express agreement, the delivery of the deed and mortgage, to constitute one transaction, must be, as it is said, simultaneous; but as the law in this case disregards fractions of a day it is held sufficient if the mortgage is

mainder to his son in tail, remainder to the right heirs of the father. Both of them were attainted of felony, and executed together. The son had no issue, and the father left a widow. Evidence was given of the father's having moved or struggled after the son, and the father's widow claimed dower of the estate, and it was adjudged to her. The principle appears to be this: that the instant the father survived the son, the estate for the life of the father united with the remainder in fee limited to him upon the determination of the vested estate tail in the son, so that the less estate having merged in the greater, the father became seised of the freehold and inheritance for a *moment* [*i. e.*, beneficially, though momentarily] to which dower attached itself." See as to the effect of a vested remainder interposed between the husband's freehold and inheritance, § 295, *supra*.

With reference to beneficial seisin as the test for dower, it is said in 1 Scribner, Dower, 278: "If the husband mortgage lands of which he is seised to a third person to secure a debt which does not originate from, and has no connection with the purchase of the lands, the general rule is that the wife is not affected by the mortgage; and the fact that the mortgage is executed immediately after the seisin has attached will not, it is apprehended, make any material difference in the case. . . . A husband at the same time that he received a deed for lands conveyed them by deed to a third person; and it was determined that inasmuch as he had been seised beneficially, although for an instant only, the wife should have her dower [citing *Stanwood v. Dunning*, 2 Shep. (Me.) 290], and this holding would seem to be in accordance with correct principle, and the general tenor of the authorities."

executed on a later hour of the day on which the conveyance to the purchaser is made. When, however, there is no express agreement that the purchaser shall give the mortgage, and it is executed on a day subsequent to the conveyance, the wife (unless she unites in the mortgage) is entitled to her full dower in the land.¹

It need hardly be added that the above doctrines as to a purchase-money mortgage are equally applicable where the purchaser, instead of a mortgagee, gives a deed of trust to a third person to secure to the vendor the payment of the purchase-money—the usual course in Virginia and other States.

¹ MORTGAGE OR DEED OF TRUST TO SECURE PURCHASE-MONEY UNDER THE WEST VIRGINIA STATUTE.—In several of the States the general rule above laid down is declared by statute. See 10 Am. & Eng. Ency. of Law, 139, note. The West Virginia statute, however, is peculiar in this, that it seems to make a mortgage for purchase-money paramount to dower (when the land is sold to satisfy the same in the lifetime of the husband) though the wife does not unite therein, and though the mortgage by, and the deed of conveyance to, the husband are not parts of one transaction. The statute declares (Code W. Va. 1899, ch. 65, § 3); “Where land is *bona fide* sold in the lifetime of the husband to satisfy a lien or encumbrance thereon created by deed in which the wife has united, *or for the purchase money thereof whether she has united therein or not*, . . . she shall have no right to be endowed of such land”; but (the statute goes on to provide) shall be dowable of the surplus only after satisfying the said lien, or encumbrance, or purchase money.

It will be perceived that nothing is said as to the time when the husband shall give the deed creating the encumbrance, or as to its being given in pursuance of an agreement with the vendor before his deed of conveyance. If the view suggested above as to the effect of the statute be correct, its policy would seem to be to extend the general rule which denies *homestead* in all cases as against the seller's claim to unpaid purchase-money (see Code W. Va. ch. 41, § 32) to the widow's claim of dower, making it subordinate to the seller's claim for unpaid purchase-money whenever the buyer has at any time given a mortgage or deed of trust to secure it (though his wife does not unite therein), provided the land is *bona fide* sold in the husband's lifetime to satisfy such encumbrance. See Constitution of Virginia, 1902, § 190.

And it is also held by the great weight of authority that the doctrine of treating the deed of conveyance and the mortgage as constituting one transaction applies equally in favor of a third person who advances the purchase-money to the buyer, and takes from him a mortgage or deed of trust by way of security. See 1 Scribner, Dower, 274; 10 Am. & Eng. Ency. Law (2d ed.) 137; 4 L. R. A. 606, note; *Roush v. Miller*, 39 W. Va. 638 (20 S. E. 663).¹

§ 301. Dower in the Equity of Redemption of Mortgaged Land.²—In 1 Scribner, Dower, 463, it is said: “Until the

¹ PURCHASE-MONEY MORTGAGE.—The cases on this subject are numerous. See *Gilliam v. Moore*, 4 Leigh (Va.) 30; *Blair v. Thompson*, 11 Gratt. (Va.) 441; *Summers v. Darne*, 31 Gratt. 791; *Cowardin v. Anderson*, 78 Va. 88; *Coffman v. Coffman*, 79 Va. 504; *Hurst v. Dulaney*, 87 Va. 444; *Building, etc., Co. v. Fray*, 96 Va. 559; *George v. Cooper*, 15 W. Va. 666; *Martin v. Smith*, 25 W. Va. 580; *Hallett v. Parker*, 69 N. H. 134 (39 Atl. 583); *Boorum v. Tucker*, 51 N. J. Eq. 135 (26 Atl. 456); *Butcher v. Thornburg*, 131 Ind. 237 (30 N. E. 1073); *Elliott v. Plattor*, 43 Ohio St. 198 (1 N. E. 222); *Jefferies v. Fort*, 43 S. C. 48 (20 S. E. 755); *Groce v. Ponder*, (S. C.) 41 S. E. 83.

For the doctrine under the Georgia statute (contrary to the general rule), see *Slaughter v. Culpepper*, 44 Ga. 319. The Kentucky doctrine is also said to be exceptional. See 1 Scribner, Dower, 276, and 2 Min. Ins. 146, both citing *McClure v. Harris*, 12 B. Mon. 261. But see *Gully v. Ray*, 18 B. Mon. 107, 114.

² DOWER IN AN EQUITY OF REDEMPTION.—In this connection, it is assumed, of course, that the right of the mortgagee is paramount to dower (see § 299, *supra*). For if this were not the case, the widow would be dowable of the land itself, and the mortgagee's security would be, to that extent, diminished, as is the case when the wife does not join in the husband's mortgage made during the coverture. But when the mortgage on the husband's land to secure his debt is paramount to dower, and the debt is due and payable, the widow of the mortgagor can be endowed, so far as the right of the mortgagee is concerned, of the equity of redemption only, *i. e.*, of the residue of interest remaining in the husband, or his heirs, after the payment of the mortgage debt. This assumes that the mortgaged land is sold under a foreclosure, and that a

passage of the late Dower Act (see § 292, *supra*) it was held in England that equities of redemption of mortgages in fee were not subject to dower. This was considered the necessary result of the rule excluding dower from equitable estates, the right of redemption being regarded as a mere

surplus remains after satisfaction of the mortgage. Here it is plain that, strictly speaking, she is endowed not of the equity of redemption (which has ceased to exist), but of its equivalent in money. The widow, however, has a right to redeem the land by virtue of her interest in the equity of redemption; and in that case she is endowed of the land itself, just as if no mortgage had ever encumbered it. And by the consent of the creditor, if neither the widow nor the heir cares to redeem, the mortgage debt may remain outstanding, in which case, also, the widow must be endowed of the land itself. But as the widow has the possession and profits of one-third of the land, she must keep down the interest on one-third of the mortgage debt. See, as to the right of the widow to redeem, 1 Scribner, Dower, 481, 497; 1 Bishop, Mar. Wom. § 292; 10 Am. & Eng. Ency. Law (2d ed.) 166; 11 Id. 223. As to dower when the mortgage debt remains outstanding, see 1 Scribner, 546, 595; 2 Id. 648, 696, 775; 2 Min. Ins. (4th ed.) 142, 387.

It is well settled that not only is the widow entitled to redeem by virtue of her dower consummate after her husband's death, but even a wife, who has joined in the husband's mortgage, may redeem in his lifetime, by virtue of her inchoate right of dower. 10 Am. & Eng. Ency. Law, 166; 11 Id. 223, and note. Thus in *Gatewood v. Gatewood*, 75 Va. 407, 412, it is said: "It is well settled that a junior creditor, a junior mortgagee, a tenant by the curtesy, and indeed all persons having an interest in the estate, may insist on the redemption of the mortgage in order to the due enforcement of their claims. The question arises, Is the wife, the husband still living, entitled to exercise this privilege? . . . This court has repeatedly held that the wife's contingent right of dower may be the subject of contract and sale. In *Harrison v. Carroll*, 11 Leigh (Va.) Judge Stanard said: "The dower interest of the wife constitutes a valuable consideration for a settlement which will be upheld against the claims of creditors"; and this doctrine has been reaffirmed and followed in a number of cases. *William and Mary College v. Powell*, 12 Gratt. 372. That the dower interest of the wife in the husband's estate [during coverture] is such as entitles her to redeem seems, therefore, too clear for controversy." See 2 Jones, Mortgages, § 1067.

equitable title." But the Dower Act of 1833 (referred to above) was construed to give dower in an equity of redemption. 18 Eng. Ruling Cases, 376, note.

The same result was reached in Virginia by the construction placed on the Act of 1785, taking effect January 1, 1787. See § 294, *supra*. In *James v. Upton*, 96 Va. 296, the court quotes with approval this language from the opinion of Judge Baldwin in *Wilson v. Davisson*, 2 Rob. (Va.) 406: "Our Act of 1785 [now § 2429 of the Code] gives dower in equitable in like manner as in legal estates; and in this, as in other respects, the rules and incidents of legal estates are now applied to trust and mortgaged property. The equity of redemption of a mortgage in fee descends to the heirs of the mortgagor; and though the widow is not entitled to dower as against the mortgagee, where the mortgage was executed before the coverture, or during the coverture with her concurrence in the mode prescribed by law, yet in either case she is entitled to dower in the equity of redemption; for of that, or what is the same thing, of the estate subject to the mortgage, the husband is to be considered as having died seised. *Heth v. Cocke*, 1 Rand. (Va.) 344; *Swaine v. Perine*, 5 Johns. Ch. 492; *Hall v. James*, 6 Johns. Ch. 258."

In the United States generally a widow has dower in the equity of redemption of a mortgage in fee. In many States, this right is given by statute; but in others, the common law doctrine that the equity of redemption of the husband in land mortgaged by him in fee is an *equitable* estate only is rejected, except as against the mortgagee (see *Hewitt v. Cox*, 55 Ark. 225 (15 S. W. 1026); and it is held that as to all other persons he may still be deemed, notwithstanding the mortgage in fee, to have the legal seisin. And in a few of the States the common law doctrine is abrogated altogether, and it is held that the mortgagor has the legal seisin not only as to all other persons, but even as to the mortgagee, until the mortgage is foreclosed. And in those States which either modify or reject the common law—whether holding that the mortgagor has still the legal title *sub modo*, or absolutely,

until foreclosure—the widow is allowed dower, without the aid of statute. 1 Scribner, Dower, 467-476; 1 Bishop, Mar. Wom. § 291; Bisph. Eq. § 151, note; 11 Am. & Eng. Ency. Law, 210, n. 8; 5 L. R. A. 519, note.

For an elaborate discussion of the nature of the husband's interest after a mortgage in fee, see *Montgomery v. Bruere*, 4 N. J. Law, 300; s. c. 5 Id. 1019. For an emphatic affirmation of the common law doctrine that dower does not attach to an equity of redemption, because the wife is "not dowable of an equitable seisin," see *Mayburry v. Brien*, 15 Pet. (U. S.) 21, 38.

§ 302. **Dower in Equity of Redemption when Mortgage is Foreclosed in the Husband's Lifetime.**—If the equity of redemption is not foreclosed in the husband's lifetime, and so at his death still exists as an estate in the land, it has been seen (§ 301, *supra*) that the widow is now dowable therein in England and the United States. It has also been stated (p. 469, note) that the wife may, in the lifetime of the husband, redeem a mortgage by virtue of her inchoate right of dower. But suppose she does not so redeem, and the mortgage is foreclosed, and the land sold in the lifetime of the husband: is the wife dowable of the surplus, if any, of the proceeds of the land after the payment of the mortgage debt?

On this question there is some conflict, though the weight of authority and the better reason are in favor of allowing the widow dower in such surplus. See 1 Scribner, Dower, 501-505, where the subject is discussed, citing in favor of the right *Denton v. Nanny*, 8 Barb. (N. Y.) 618; *Vartie v. Underwood*, 18 Barb. 562; *Vreeland v. Jacobus*, 19 N. J. Eq. 231; *Unger v. Leiter*, 32 Ohio St. 210. And see 4 L. R. A. 118, note; *Mandel v. McClave*, 46 Ohio St. 407 (15 Am. St. Rep. 627). For American statutes, see Stimson, Am. Statute Law, § 3216.

The best considered case in favor of the wife's dower in the surplus is *Denton v. Nanny*, 8 Barb. N. Y. 618. The court says: "Land has been sold in which the wife had

a legal interest which was not required to pay the mortgage debt. And upon the principle of equitable conversion the proceeds so far as affects her must still be regarded as real estate. . . . She does not ask to have this money put into her immediate possession. She would have no right to that. But she insists that the residuum of the subject mortgaged, not required to satisfy the mortgage debt, whether it consists of lands unsold, or in the proceeds of lands sold under the power of the court, shall be so appropriated as to secure her dower should she survive her husband. This I think she is entitled to have done."

On the other hand, in one of the earliest cases on the subject, *Wilson v. Davisson*, 2 Rob. (Va.), 384, decided in 1843, it was held that the widow of the mortgagor, when the land is sold in his lifetime, is not dowable of the surplus. The ground of the decision is thus stated by Baldwin, J.: "The property sold was his [*i. e.*, the husband's], and its conversion from realty into personalty was not his act, but by the operation of the paramount incumbrance. In its new form, it was still his after satisfying the incumbrance; but its character being changed, it was no longer subject to a future dower title as realty, but only to that provision which the law makes for a widow out of the personal estate of her husband subsisting at his death, after payment of his just debts. If the husband had been dead, and she surviving, at the time of the sale, then her dower right, subject to the incumbrance, would have ripened into a perfect title, and her interest in the surplus could not have been divested by the discretion which the court had exercised of selling the whole land, instead of such part only as might have been sufficient to discharge the incumbrance."¹

¹ THE DOCTRINE OF *WILSON v. DAVISSON*.—In this case the paramount encumbrance was not a mortgage, but an implied vendor's lien, for unpaid purchase-money, after the conveyance of the legal title to the husband. On this ground, viz., that the husband had legal seisin during the coverture—one of the three judges, who decided the case (Allen, J.) dissented; but the other two judges

The doctrine of *Wilson v. Davisson* was abrogated by statute taking effect July 1, 1850 (Code 1849, ch. 110, § 3; Code 1887, § 2269), as follows:

“Where land is *bona fide* sold in the lifetime of the husband to satisfy a lien or encumbrance thereon created by deed in which the wife has united, or created before the marriage, or otherwise paramount to the wife, she shall have no right to be endowed in the said land. But if a surplus of

(Baldwin and Stanard, JJ.) refused to make any distinction between a vendor's lien and a mortgage, and held (upon the reasoning given in the text) that in both cases a sale to satisfy the paramount encumbrance in the husband's lifetime destroyed the wife's inchoate dower right in the surplus.

The doctrine of *Wilson v. Davisson* was applied to the paramount encumbrance of a mortgage, in the recent case of *Grube v. Lilienthal*, 51 S. C. 442 (29 S. E. 230), and the wife was denied dower in the surplus, when the sale was made during coverture, for the following reasons: “As the wife, by her act of renunciation [*i. e.*, by uniting in the mortgage], assisted in bringing about a change of seisin by which her right of dower was destroyed, and by which the surplus proceeds of the sale became the property of the husband, the court had no more authority for impressing a trust upon the surplus proceeds of sale than it had to impress a trust on any other personal property of the husband. The right of dower was completely extinguished and destroyed when the seisin, during coverture, was broken by aid of the wife; and the court had no power to transfer the right to the surplus proceeds of the sale.” And see the query as to the effect of the New York Statute in *Brackett v. Baum*, 50 N. Y. 8, 11.

On the subject of “Dower as against the vendor's lien for unpaid purchase-money,” see 1 Scribner, Dower, pp. 554-561; 4 L. R. A. 606, note. The *implied* vendor's lien was abolished in Virginia by statute taking effect July 1, 1850. It enacts as follows (Code Va. § 2474): “If any person hereafter convey any real estate, and the purchase-money, or any part thereof, remain unpaid at the time of conveyance, he shall not thereby have a lien for such unpaid purchase-money, unless such lien be expressly reserved on the face of the conveyance.” But this statute has no application to a vendor *who does not convey*, but retains the title to the land as security for the unpaid purchase-money. 2 Min. Ins. (4th ed.) 355. See p. 464, *supra*, note.

the proceeds of sale remain after satisfying the said lien or encumbrance, she shall be entitled to dower in the said surplus; and a court of equity having jurisdiction of the case may make such order as may seem to it proper to secure her right." See *Robinson v. Shacklett*, 29 Gratt. 99; *Cowardin v. Anderson*, 78 Va. 88; *Coffman v. Coffman*, 79 Va. 504; *Hurst v. Dulaney*, 87 Va. 444; *Building Co. v. Fray*, 96 Va. 559; *Holden v. Boggess*, 20 W. Va. 62.

For the Kentucky statute, see *Tisdale v. Risk*, 7 Bush. 139; *Ratcliff v. Mason*, 92 Ky. 190 (17 S. W. 438); *Schweitzer v. Wagner* (Ky.), 22 S. W. 883.

§ 303. **Dower in Equity of Redemption—Extent of in the United States.**—As to the extent of the dower right in the surplus of the proceeds of land sold in order to satisfy an encumbrance paramount to dower, there can be no doubt that it would be confined to one-third of such surplus in every case except one, and that is when the wife has united with her husband in a mortgage or deed of trust of his land to secure his debt. In this last case, it has been claimed that the wife stands as a surety merely for the husband's debt; and that while as between her and the mortgagee she has relinquished her dower to the extent that may be necessary for the payment of the secured debt, yet as between her and the husband's heirs or devisees, or his other creditors, she is entitled to her full right of dower in the proceeds of the mortgaged land, payable of course out of the surplus: and this though thereby the whole of the surplus may be appropriated to the satisfaction of her dower. The doctrine of exoneration of a surety out of the principal's (husband's) estate is invoked in the wife's favor. Thus if the mortgage debt is \$12,000, and the proceeds of the mortgaged land are \$18,000, the surplus of \$6,000 would be absorbed by the dower of the widow, being her full dower right in the whole proceeds of the land.

The doctrine explained above—that the widow has the right of a surety—has been applied in the later cases in

Ohio. Thus in *Mandel v. McClave*, 46 Ohio St. 407 (15 Am. St. Rep. 627; 5 L. R. A. 519), it is held that where a wife joins with her husband in a mortgage of his land to secure his debt, such release of her right of dower enures only to the benefit of the mortgagee and his privies, but does not enure to the benefit of subsequent creditors of her husband; and if a judicial sale be made under judgments in their favor, she will be entitled to have the value of her contingent right of dower in the entire proceeds ascertained, and to have the same paid to her out of the balance left after payment of the mortgage debt, before any part of such balance can be applied to the payment of their judgments.¹

¹ DOCTRINE OF WIFE'S SURETYSHIP IN OHIO—SAME DOCTRINE IN NORTH CAROLINA AND INDIANA.—In *Mandel v. McClave*, *supra*, the court thus explains the decision: "We are aware that this question has been decided differently in many of the States, but by courts holding views of the nature of contingent dower, and of the effect of the wife's release thereof, widely different from those adopted in this State in relation thereto; and the decisions are therefore of little or no weight here. . . . If the plaintiff in error [the wife] had been seised of a separate estate, and it had been pledged, together with the husband's property, for the payment of his debt, there can be no doubt that his property would be primarily liable for its payment. As between each other, he would be the principal, and she his surety. We think the same principle should be applied to her contingent right of dower. It is property; its value can be ascertained. . . . It is a provision for her support; and when she pledges it for her husband's debt, by joining in a mortgage with him, the most obvious principles of natural justice require that this benevolent provision of the law should not be touched until the husband's interest has been first exhausted."

In North Carolina also the doctrine that the wife who joins in the husband's mortgage becomes his surety for the debt is adopted in recent cases. For the widow's dower right in that State, see *Askew v. Askew*, 103 N. C. 285 (9 S. E. 646); *Gore v. Townsend*, 105 N. C. 228 (11 S. E. 160); *Overton v. Hinton*, 123 N. C. 1 (31 S. E. 285). And in Indiana, under the peculiar statute as to dower (see *infra*, § —) the wife of a mortgagor who unites in the deed

In the United States generally (with the exception of North Carolina and Indiana. See note p. 476, *supra*) the Ohio doctrine that the wife who unites in her husband's mortgage becomes a surety for the debt is rejected, with the result that she is entitled to dower in the surplus only of the proceeds of the sale. See 10 Am. & Eng. Ency. Law, 169, where the law is thus stated: "The general rule is that when the husband has mortgaged his land before coverture, or the wife during coverture has united with him in mortgaging land belonging to him, and such land is sold under the mortgage, the widow, if the sale takes place after the death of the husband, and the wife, if the sale takes place before his death in jurisdictions where the inchoate right of dower is regarded as such an interest as must be protected, is entitled to have her dower assigned or reserved from the

is considered a surety for her husband. See *Virgin v. Virgin*, 189 Ill. 144 (59 N. E. 586), where the Indiana law is explained as exceptional, citing *Shobe v. Brinson*, 148 Ind. 285 (47 N. E. 625.)

In 19 Am. & Eng. Ency. of Law, 1321, the widow's right to dower is thus laid down: "To protect the right of dower, the rule of exoneration, either as an equitable principle or as a statutory provision, may be invoked by the widow. Thus, where the wife joined with her husband in a mortgage of his land, she is entitled after his death to require the personal representative to use in discharging the mortgage all other assets of the estate, real as well as personal, not necessary for the payment of debts preferred by statute, so that her dower interest may be taken last under the encumbrance. Under this rule, the personal estate, the remaining two-thirds of the realty, and the reversion in the third subject to her dower, are all to be applied to the payment of a mortgage, or of purchase-money due in respect of land purchased by her husband, before her share shall be taken." For this statement of the law, only Indiana and North Carolina cases are cited. As is shown above, the doctrine of these States is peculiar; and the general doctrine in the United States, both as to other lands of the husband, and as to the interest of the heir in the mortgaged land, is far less liberal to the widow. See § 303, above, for the general rule as to the extent of her dower in an equity of redemption. And see § 306, *infra*, as to her right of exoneration out of other lands of her husband.

surplus only, after paying the whole amount of the mortgage indebtedness. The dower interest should be confined to one-third of the value of the excess of the land, after deducting the entire amount owing upon the mortgage." And see 1 Scrib., Dower, 516.

The reason for the general rule which confines the widow to one-third of the surplus is thus stated by Chancellor Walworth in *Hawley v. Bradford*, 9 Paige, 200 (37 Am. Dec. 390): "It is settled law that where the wife pledges her separate estate, or the reversionary interest in her real property, for the debt of her husband, she is entitled to the ordinary rights and privileges of a surety. . . . I am not aware of any decision, however, in which the principle of suretyship has been applied to a case like the present. . . . Strictly speaking, the wife has no estate or interest in the lands of her husband during his life which is capable of being mortgaged or pledged for the payment of his debt. Her joining in the mortgage, therefore, merely operates by way of release or extinguishment of her future claim to dower as against the mortgagee, if she survives her husband, without impairing her contingent right of dower in the equity of redemption. The master, therefore, was right in supposing that Mrs. Bradford was not entitled to be endowed of the whole proceeds of the mortgaged premises, but only of the surplus which remained after paying the mortgage debt and the costs of foreclosure." And see to the same effect *Bank of Commerce v. Owens*, 31 Md. 320 (1 Am. Rep. 60); *Burnett v. Burnett*, 46 N. J. Eq. 144, 18 Atl. 374 (examining and rejecting the Ohio doctrine); *Virgin v. Virgin*, 189 Ill. 144, 59 N. E. 586 (quoting and approving the general rule as laid down in 10 Am. & Eng. Ency. Law on p. 477, *supra*).

§ 304. **Extent in Virginia of Dower in Equity of Redemption.**—Whether the widow is entitled to dower in the whole proceeds, payable out of the surplus, or is dowable of the surplus only, is unsettled in Virginia, both when the land is

sold in the life of the husband, and when the sale takes place after the husband's death. See *Land v. Shipp*, 98 Va. 284, 293.¹

When the land is sold *in the lifetime of the husband*, the Code (§ 2269) places the case where the wife unites with the husband in the deed creating the lien or encumbrance along with that of a lien or encumbrance "created before the

¹ EXTENT OF WIDOW'S DOWER RIGHT IN VIRGINIA—DECISION IN *WILSON v. BRANCH*.—The only case in Virginia which favors the right of the widow, when she has joined her husband in a mortgage or deed of trust on his land to secure his debt, to her full right of dower as against the heir, and that in the land itself, is *Wilson v. Branch*, 77 Va. 65. But it is respectfully submitted that this case is contrary to authority and unsound on principle.

In *Wilson v. Branch, supra*, there were two estates in land involved, halves of an undivided tract called Cedar Lawn, one-half belonging to the husband, and (under the decision of the Court of Appeals) the other half belonging to the wife, when the deed of trust of 1876 was made, by husband and wife jointly, to secure the husband's debt. As to the wife's half, she was, of course, a surety for the husband; and, as was said by the Court of Appeals (p. 74): "The Circuit Court erred in decreeing the sale of the Cedar Lawn tract without first dividing the same, so as to save the wife her undivided moiety, which was her maiden property." But the lower court is also said to have erred, "in selling the residue [*i. e.*, the husband's half] without laying off and assigning to the widow her dower in kind by metes and bounds, or first ascertaining that it was impracticable to so assign the dower." See p. 74. And on p. 69, it is said (without, however, at this point distinguishing between the two halves, and apparently conceding for the moment that the Circuit Court was right in its view that in 1876 when the trust deed was made all the land belonged to the husband): "It does not appear that dower could not be assigned, and the residue sold to secure the creditor secured by the trust deed, with the right reserved to proceed further against the dower if the trust deed debt was still unsatisfied."

There seems no doubt, from the above extracts, that the court supposed the widow was entitled to full dower, and in the land itself, and that it was not to be sold under the deed of trust unless it became necessary to trench upon it to pay the secured creditor. But there is not one word of discussion as to the extent of the

marriage, or otherwise paramount to the wife," and declares as to all alike that "if a surplus of the proceeds of sale

widow's dower right. The mind of the court is entirely on the point of dower *in kind*. This it declares practicable, having regard to the relative amounts of *the value of the land* and of the *debt secured*. And three Virginia cases are relied on, viz.: *Blair v. Thompson*, 11 Gratt. 441; *White v. White*, 16 Gratt. 264; and *Simmons v. Lyle*, 27 Gratt. 922, which do declare that the widow must have dower in kind unless it be impracticable from "the nature of the husband's interest, or from the nature and quality of the property itself," but not a word is said in them as to *relative amounts*. And in all of these three cases, the widow's dower was *paramount to the encumbrance*, and of course she was entitled to dower in kind, if practicable, having regard to the nature of the husband's interest and of the property.

This part of the decision in *Wilson v. Branch*, then, finds no support in any of the Virginia cases cited, and is opposed to an almost unbroken current of authority elsewhere. The cases in Ohio to the contrary, *Mandel v. McClave* (where the sale was in the husband's lifetime), and *Kling v. Ballentine* (cited therein, where the sale was after the husband's death) are avowedly placed on the theory of the wife's suretyship for her husband, and it is conceded that where that doctrine is repudiated (as it is in Virginia) the result must be to confine the widow to one-third of the surplus. And the peculiar doctrine in Indiana and North Carolina is also placed on the ground of suretyship. See p. 476, *supra*, note.

In *Heth v. Cocke*, 1 Rand. (Va.) 344, it is held that the only claim of the widow in her husband's real estate which has been mortgaged by him before the marriage is in the equity of redemption; and it is declared that the same principle applies as well to a mortgage after marriage where the wife unites with her husband. And on p. 347, it is said: "If neither the heir nor the widow redeem, and the land sells for more than the debt, the excess is the value of the equity of redemption, and she can only be endowed as to *one-third of that excess*." And on p. 348 it is said: "Suppose she had been defendant in this suit, could she have claimed to have her dower laid off and the residue sold? I apprehend the mortgagee could not have been compelled to sell in parcels. . . . But if he could have been paid in this way, could the heir be thus deprived of his interest in the equity of redemption? The two-thirds may only sell for enough to pay the debt, and sell too at a great sacrifice in consequence of a severance of the property."

remain after satisfying the said lien or encumbrance, she shall be entitled to dower in said surplus"—which clearly confines her dower interest to one-third of the surplus. See § 303, *supra*. And that the law is the same in Virginia (in accord with the general rule laid down above), when the sale is made *after the death of her husband*, would seem to be indicated (so far as the opposite view rests upon the doctrine of suretyship) by the case of *Gatewood v. Gatewood*, 75 Va. 407, 415, when it is said by Staples, J., that a married woman who joins in a mortgage by the husband on his lands is not a surety for the debt; and also by the following language of the same learned judge in *Corr v. Porter*, 33 Gratt. 278, 285: "During the life of the husband, the wife has no estate or interest in his lands. She has a mere contingent right of dower which may be the subject of a conveyance or relinquishment under the statute. It may also constitute a valuable consideration for a post-nuptial settlement, because it is in the nature of a contingent lien or encumbrance upon the realty. Beyond this, however, it is not even a right in action. When the wife unites with the husband in conveying the property to a purchaser, the effect is not to vest in the latter the dower interest, or any estate separate and distinct from that of the husband, but simply to relinquish a contingent right in the nature of an encumbrance upon the property conveyed, which, if not so relinquished, will attach and be consummate on the death of the husband. This right being relinquished is gone forever, the charge upon the estate ceases, and the title of the purchaser becomes complete. The title so acquired is not to two estates or interests, that of the husband and wife, but to one estate, that of the husband, discharged from the wife's contingent claim of dower." And see p. 438, *supra*, note.

But where a wife unites with her husband in conveying her maiden lands in trust to secure the individual debts of her husband, then the wife becomes the surety of her husband, and, in the absence of any agreement to the contrary, is entitled to all the rights of a surety. *Filler v. Tyler*, 91

Va. 458. And see the same doctrine laid down by Chancellor Walworth in *Hawley v. Bradford*, 9 Paige, 129, quoted at p. 478, *supra*.

§ 305. **Exoneration of Dower in Mortgaged Land out of the Husband's Personalty.**—In *Hewitt v. Cox*, 55 Ark. 225 (15 S. W. 1026, 17 S. W. 873) it is said of the decisions of the American courts on this subject: "They differ as to her right to require the executor or administrator to redeem the land set apart to her as dower from incumbrances thereon which are created by mortgages executed by her and her husband to secure his debts, she having relinquished her right to dower in the land in legal form. One class holds that the personal estate of the husband is primarily liable for his debts, and that the widow can require his personal representative to apply that estate to relieving the dower land from the incumbrance. *Campbell v. Campbell*, 30 N. J. Eq. 415; *Henagan v. Harllee*, 10 Rich. Eq. (S. C.) 285; *Klinck v. Keckley*, 2 Hill Eq. (S. C.) 250; *Mantz v. Buchanan*, 1 Md. Ch. 202; *Harrow v. Johnson*, 3 Metc. (Ky.) 578; *Matthewson v. Smith*, 1 Ang. (R. I.) 23 *Peckham v. Hadwen*, 8 R. I., 160; *Campbell v. Murphy*, 2 Jones, Eq. (N. C.) 357; *Creecy v. Pearce*, 69 N. C. 67; *Mandel v. McClave*, 46 Ohio St. 407 (22 N. E. 290); *Boynton v. Sawyer*, 35 Ala. 497. Another class, eliminating the interest of the mortgagee in the land, and treating the residue as the entire interest of the husband, holds that the widow is only entitled to dower in that interest—that is to say in the equity of redemption; and treats her dower interest, to the extent of the debt secured, as extinguished by her joining her husband in the execution of the mortgage, and releasing or relinquishing her right of dower; and holds that she takes the land subject to the mortgage [*i. e.*, when she receives her dower in the land], and is not entitled to have any part in the residue of her husband's estate appropriated to the satisfaction of the mortgage in exoneration of her dower. *Hawley v. Bradford*, 9 Paige (N. Y.) 200;

Tabele v. Tabele, 1 Johns. Ch. (N. Y.) 45; *Titus v. Neilson*, 5 Id. 451; *Evertson v. Tappen*, *Ibid*, 497; *Whitehead v. Cummins*, 2 Cart. (Ind.) 58; *Daniel v. Leitch*, 13 Gratt. (Va.) 195; *Trowbridge v. Sypher*, 55 Ia. 352 (7 N. W. 567); *Bank v. Hinton*, 21 Ohio 509; *Scott v. Hancock*, 13 Mass. 162; *Gibson v. Crehore*, 3 Pick (Mass.) 475; s. c. 5 Id. 146; *Rossiter v. Cossitt*, 15 N. H. 38; *Hastings v. Stevens*, 9 Fost. (N. H.) 564; Appeal of Platt, 56 Conn. 572 (16 Atl. 669) 4 Kent. Com. (12th ed.) pp. 46, 47; 1 Scrib., Dower (2d ed.) 511-516; 1 Jones, Mortg. (4th ed.) §§ 666, 686; 2 Jones, Mortg. § 1693."

The court rejected the claim that the wife was a surety for the husband, saying: "But it is contended that Mrs. Hewitt never released her dower to her husband, or to his administrator, or devisees, but only to the mortgagee as security for the payment of a single debt of the husband, for which she did not bind herself personally; and that therefore the personal assets of the estate of the husband, the principal, should be exhausted before that of the surety should be taken. The fallacy of this contention consists in assuming that the wife has an estate or interest in the lands of the husband during his life which she can mortgage as her own separate estate. In speaking of the interest of the wife in the husband's lands in *Smith v. Howell*, 53 Ark. 279 (13 S. W. 929), calling it an 'inchoate right of dower,' this court said: 'The inchoate right of dower during the lifetime of the husband is not an estate in land; it is not even a vested right, but a mere intangible, inchoate contingent expectancy. The law regards it as in the nature of an incumbrance on the husband's title, and the statute cited provides a means whereby he may convey his title free from the incumbrance. She joins not to alienate any estate, but to relinquish a future contingent right.'" And see, in accord with this view, of the nature of inchoate dower, p. 438, *supra*, note.

In the above extract it is assumed that, as the wife who unites in her husband's mortgage cannot be considered a surety for his debt, she is therefore not entitled to claim

exoneration of her dower out of his personalty. This, however, does not necessarily follow. The true view would seem to be that as to the equity of redemption the widow and the husband's heir or devisee are, so far as their respective interests are concerned, *in consimili casu*; and whatever right of exoneration the heir or devisee may have must redound to the benefit of the widow. Now it is certain (where the rule has not been changed by statute) that in the administration of the assets of a solvent estate the heir or devisee of mortgaged land, provided the debt secured is *the personal debt of the testator or intestate*, is entitled to have the mortgage debt paid out of the personalty; or, if the mortgagee (as of right he may) has subjected the mortgaged land to the payment of his debt, then the heir or devisee is entitled to exoneration out of the personalty. It would seem, on principle, impossible to deny to the widow the same right of exoneration; and this not because she is a surety for her husband, but because she has a dower right in land entitled to exoneration out of his personalty. But if the husband dies insolvent, all his estate is liable for his debts, save only the widow's dower in the surplus of the proceeds of the mortgaged land; and of course no further right of dower can accrue to her by reason of her relation to the heir or devisee.¹

¹ EXONERATION OF DOWER OUT OF PERSONALTY AS AGAINST A PECUNIARY LEGATEE.—In *Todd v. McFall*, 96 Va. 754 (32 S. E. 472) it was held that "a legatee has no right to call upon the devisees to contribute to the legacy, unless the real estate be charged with its payment, not even where the personal property has been applied in exoneration of the land from a mortgage debt or vendor's lien, if the debt was contracted, and the mortgage or lien on the land was created, by the testator himself." The facts of the case show that the court means (and it was so held) that where there is no general charge for the payment of debts, and the legacy is not charged on the land, a pecuniary legacy is payable primarily out of the personalty only; and though the personalty is exhausted in payment of a mortgage or vendor's lien on land specifically devised, this does not entitle the legatee to exoneration out of such

From the authorities cited above in the quotation from *Hewitt v. Cox*, it will be seen that a number of States which

land to the extent of the encumbrance satisfied out of the personalty.

If this be the law, it is manifest that it has an important bearing on the dower right of the widow of such devisee of encumbered land. For if the devisee has exoneration out of the personalty, without liability over to the pecuniary legatee, the widow of the devisee would share the benefit of such exoneration, and thus be let in to her full dower in the land. On the other hand, if the legatee has, to the extent that the personalty is exhausted in paying off the encumbrance, a right to exoneration out of the encumbered land devised, it is manifest that neither the devisee nor widow will ultimately reap any benefit from the application of the personalty to the satisfaction of the lien—unless, indeed, the personalty so applied be more in value than is needed to pay the legacy.

It is believed, however, that the doctrine of *Todd v. McFall* is contrary to the weight of authority, and that a pecuniary legatee is entitled to exoneration out of land devised subject to a mortgage or vendor's lien, to the extent that the personalty has been applied to the satisfaction of the encumbrance.

Of course, it is well settled that a pecuniary legatee is not entitled to exoneration out of land devised, neither encumbered, nor under a general charge for the payment of debts; but, in the case now under consideration, the question is as to exoneration in favor of such legatee out of land devised indeed, but on which there is the specific encumbrance of a mortgage or vendor's lien for the personal debt of the testator. In this case it is now settled law in England and in the United States (outside of Massachusetts and Virginia) that the legatee is entitled to exoneration out of such land as against the devisee. See 19 Am. & Eng. Ency. Law (2d ed.) 1311; 1322; 1325; 1326. And the law is the same as to both mortgage and vendor's lien. *Ibid.* 1376. As to the Massachusetts rule, see *Brown v. Baron*, 162 Mass. 56 (44 Am. St. Rep. 331), where the case is decided on "the well settled rule in this commonwealth that the devisee of specific real estate is entitled, in the absence of a contrary intention on the part of the testator, to have it exonerated from a mortgage placed upon it by the testator, even though the personal estate is insufficient to pay general legacies" [citing only Massachusetts cases].

Of the cases cited in *Todd v. McFall* on the question under dis-

deny to the widow dower save in the surplus of the mortgaged land nevertheless accord to her a right of exoneration of her dower out of the personalty. And some of the cases cited as denying the widow exoneration out of the personalty are cases in which the estate of the husband was insolvent; or in which the debt was not personal to the husband, as where

cussion, *Wythe v. Henniker*, 2 Myl. & K. is in point, and as to the encumbrance of a *vendor's lien* sustains the decision of the court. But as to a mortgage (which in *Todd v. McFall* is treated as under the same rule as a vendor's lien), the decision is express that the legatee is entitled to exoneration. The court declares it to be "a settled rule of courts of equity that a pecuniary legatee is entitled to stand upon the devised estate in the place of the mortgagee, to the extent that the mortgage has been satisfied out of the personal estate." And as to the contrary ruling in that case as to a vendor's lien it is said by Lord Romilly in *Lilford v. Powys Keck*, 1 L. R. Eq. Cas. 347: "I was of the opinion in *Birds v. Askey* that in respect of the legatee's right of marshalling the distinction between a lien and a mortgage is untenable, and I am still of that opinion. The legatees are entitled to stand in the place of the vendor in respect of his lien against the estate which the testator agreed to purchase." And see 2 Jarman on Wills (Bigelow's ed.) 580, where it is said: "It is clear that the devisee of a mortgaged estate cannot claim exoneration as against pecuniary legatees." Also *Ibid.*, 629, where the law is laid down as now the same as to the devisee of land subject to a vendor's lien.

To sum up the matter: It is believed that in the order in which a testator's assets are to be applied to the payment of his debts (see *Elliott v. Carter*, 9 Gratt. (Va.) 548; *Frasier v. Littleton*, 40 S. E. (Va.) 108) lands devised on which there is a mortgage or vendor's lien are liable before general pecuniary legacies. See Adams Eq. 8th ed. (275), where it is said: "An entire or partial exhaustion of the personal estate [*i. e.*, in the payment of debts] will warrant marshalling in favor of legatees; but such marshalling can only be directed against real assets descended, lands devised for, or charged with, the payment of debts, and land devised subject to a mortgage [in a note it is added, "or subject to the vendor's lien for purchase-money which the personalty is taken to pay"]. It cannot be directed against land devised or against specific legatees." And see in accord 1 Lead. Cas. Eq. (4th Am. ed.) 473, note to *Mackreth v. Symmons*; 2 Id. 245, 340.

the land comes to him already encumbered. This was the case in *Daniel v. Leitch*, 13 Gratt. (Va.) 195, 207, where the clear implication from the language of the court is that if the debt had been personal, and the estate solvent, the widow would have been entitled to exoneration out of the personalty. As to when a debt is "personal," see *Pleasants v. Flood*, 89 Va. 96. It may be added that by statute in England (called Locke's King's Act, passed in 1854, with subsequent amendments), both mortgaged lands and lands subject to a vendor's lien are made in all cases the primary fund for the payment of the encumbrance, and exoneration is denied the heir or devisee. See Wms. R. P. (17th ed.) 610; 2 Jarman, Wills (Bigelow's ed. 590). Of course, under this statute, the widow's dower is not entitled to exoneration, since her right can rise no higher than that of the heir or devisee.

§ 306. **Exoneration of Dower in Mortgaged Land out of the Husband's Other Land.**—In 1 Scribner, Dower, 511, the following language, based on the English decisions, is quoted from *Park on Dower*, 351): "A dowress, like an heir or devisee, has of course a right to have the personal estate of her husband, as far as it will go, applied in discharge of mortgages, and other debts contracted by the husband which are charges upon the land which she holds in dower. And even where the personal estate is insufficient to discharge the debt, it would seem that in some cases, if not in all, she has the privilege of having the lands which remain in the heir charged therewith, in exoneration of the land assigned to her in dower." Scribner adds this comment, before reviewing the American decisions: "In the United States the cases on this subject are somewhat conflicting, but the weight of authority seems to be rather against the English doctrine."

As to exoneration out of *personalty* in the United States, see § 305, *supra*. As to exoneration out of realty, the law is thus laid down in 2 Min. Ins. 142: "But if the debt were one contracted by the husband himself, and the creditor's lien is

paramount to the dower, the dowress is entitled to have the incumbrance, created by the husband, cleared off out of the *husband's personalty*, in the hands of his personal representative: and, if that be insufficient, out of the lands in the hands of the husband's heir or devisee. In the latter case, therefore, the wife [widow] is not called upon to contribute anything to pay the annual interest [*i. e.*, when dower in the encumbered land has been assigned to her] until the personalty and the other lands of the husband are exhausted. 1 Tho. Co. Lit. 568, n. (B.); 1 Bright, H. & Wife, 344, 387-'8; *Heth v. Cocke*, 1 Rand. 344."

It will be perceived that Prof. Minor's statement of the law goes beyond that of Park in giving to the widow exoneration not only out of the personalty and lands descended to the heir, but even out of other lands in the hands of the husband's devisee. The only one of Prof. Minor's references which refers to exoneration is 1 Bright H. & Wife, 388, where it is said: "But it is presumed that as against her husband's general estate she would be entitled to have her dower exonerated from such encumbrances; for since her husband's heir or devisee of the dowable estate would be entitled to that equity, so, as it is conceived, would the widow also be." But it is manifest that by "general estate" is here meant "the general personal estate, not expressly or by implication exempted" (see Bisph. Eq. § 346); for it is only out of this estate (leaving out of consideration "any estate particularly devised simply for the payment of debts") (see § 108 *supra*) that "her husband's *heir* or devisee" (meaning both heir and devisee) are entitled to exoneration."

On principle, it would seem to be impossible to allow the widow (whether the mortgaged land has descended to the heir or has been devised) exoneration out of other lands of the husband *in the hands of the devisee*. For the widow's right of exoneration (assuming that the true doctrine is that she is not a surety) cannot exceed that of the heir or devisee of the mortgaged land; and it is well settled that such heir or devisee is not entitled (unless the testator has by his will

charged all his lands with the payment of his debts) to exoneration of the mortgaged debt out of other real estate specifically devised. See § 108, *supra*, for order in which assets are liable for the payment of debts, in which table land descended subject to a mortgage for the personal debt of the decedent should be placed after land devised for the payment of debts, and land devised on which there is a mortgage comes immediately after land descended to the heir; so that in neither case, whether descended or devised, could such mortgaged land be entitled to exoneration out of other lands devised. See Adams Eq. (8th ed.) 253; 19 Am. & Eng. Ency. Law, 1322; *Frasier v. Littleton* (Va.) 40 S. E. 108. The widow is, of course, *dowable* of other lands of her husband in the hands of a devisee, in addition to her dower in the equity of redemption of the land mortgaged; and she might consent to waive her dower in such other lands on condition that the devisee should discharge the mortgage, and thereby enable her to receive her full dower in the encumbered land. But this would be a matter of agreement between the widow and the devisee, and a very different thing from her having a right of exoneration as against him. See *Scott v. Hancock*, 13 Mass. 162, 168; Appeal of Platt, 56 Conn. 572 (16 Atl. 668).

But both Park and Prof. Minor declare that a widow is entitled to exoneration of a mortgage out of other land *descended to the heir*. But, assuming again that the widow is not a surety, this would seem to depend on whether the mortgaged land is in the hands of the heir or a devisee. For if in the hands of the heir, there could be no exoneration as to him out of other lands descended, and so no such right would be permitted the widow; but she would, of course, be entitled to her dower in such other lands. But if the mortgaged land is in the hands of a devisee, then such devisee is entitled to exoneration of the mortgage out of other lands descended to the heir, and this would entitle the widow to claim the benefit of such exoneration in order to admit her to her full dower in the mortgaged land. But she is also entitled to dower as against the heir in the lands descended. Is she then entitled

to throw the whole burden of exoneration on *the heir's interest* in the land descended, so as to have her full dower both as against the heir and the devisee? On principle, there seems no escape from this conclusion. The widow's right of dower is paramount to the heir; and she can have in lands descended her one-third assigned to her by metes and bounds. Her right to dower in these lands is also paramount to the devisee's right of exoneration, which must be confined to the interest of the heir. But she is entitled to the benefit of this exoneration, if the heir's interest is sufficient to pay off the mortgage; and in this way, partly in her own right and partly in the right of the devisee, she becomes entitled to full dower in all the land as against both heir and devisee.

§ 307. **Present Value of the Widow's Vested Right of Dower.**—A widow may, with the assent of all the parties interested, agree to accept a sum of money paid down as the present value of her vested dower right, instead of receiving her dower in kind, or interest during her life on one-third of the value of her husband's lands. 2 Scribner, Dower, 606, 613; *Blair v. Thompson*, 11 Grat. 441; *Pierce v. Graham*, 85 Va. 227 (7 S. E. 189); *Scott v. Ashlin*, 86 Va. 581 (10 S. E. 751); *Johnson v. Gordon*, 102 Ga. 350 (30 S. E. 507); *Jarrell v. French*, 43 W. Va. 456 (27 S. E. 263); *Robinson v. Govers*, 138 N. Y. 425 (34 N. E. 209, 514). In ascertaining such present value, the first question is the probable duration of the widow's life. This is ascertained by reference to Tables of Mortality. 2 Scribner, Dower, 622, *et seq.*; *Wilson v. Davisson*, 2 Rob. (Va.) 384; *Norfolk, &c. R. Co. v. Phillips*, 100 Va. 362 (41 S. E. 726); *Damm v. Damm*, 107 Mich. 619 (63 Am. St. Rep. 601); 20 Am. & Eng. Ency., Law (2d ed.) 883; *Gordon v. Tweedy*, 74 Ala. 232 (49 Am. Rep. 813).

If now the widow's expectation of life, thus ascertained, is twenty years, and her husband's real estate of inheritance is worth \$3,000, the widow is entitled, as her dower right, to \$1,000 for twenty years. At six per cent., the interest on

\$1,000 is \$60 a year. The problem, then, is to ascertain the present (or cash) value of an annuity of \$60 a year, to continue twenty years, discounted at compound interest. *Wilson v. Davisson*, 2 Rob. (Va.) 384; *Gaw v. Huffman*, 12 Grat. 638. This is the calculation:

First year—106: 100 : : 60 : 56.604.

Second year—106: 100 : : 56.604 : 53.40.

Third year—106 : 100 : : 53.40 : 50.377.

And so on for the 20 years. Then the sum of all the present values gives the total sum in cash to which the widow is now entitled. In Virginia an annuity table has been adopted by statute by which the present value can be readily ascertained. Code Va. §§ 2281-3.¹

¹ TABLES OF MORTALITY.—In *Wilson v. Davisson*, 2 Rob. (Va.) 384, the lower court adopted Wigglesworth's Table of Longevity, to which no objection was made on appeal; and it is inferred by the Reporter that "in estimating the probable duration of life in Virginia this table, in the absence of any other better adapted to our State, may be generally used as a guide, liable, of course, to be departed from when the particular circumstances of any case may make it proper to do so. But it may be remarked that the annuity table adopted in Code Va., §§ 2281-3 (see § 307, above) is based, not on the Wigglesworth table, but on the Carlisle table, by which the expectation of life is greater than by the Wigglesworth table. 2 Scribner, Dower (2d ed.), 811, 814. And see *Norfolk, &c., R. Co. v. Phillips*, 100 Va. 362, 371, where it is said of mortality tables: "These tables were made for the purpose of life insurance and annuities, where the very shortest time is fixed as affecting pecuniary risks. They are regarded as falling short, in most instances, of the actual duration of human life." Citing *Mulcairns v. City of Janesville*, 67 Wis. 37 (29 N. W. 565).

De Moivre's Rule. In 2 Minor's Institutes (4th ed.), 144, note, it is said: "As tables of the probabilities of life may not be always accessible, the following rule, stated by De Moivre, may easily be remembered: Regarding 86 as practically the extreme limit of human life, he proposes to deduct the actual age from that number, and to divide the remainder (which he styles the complement of life) by two, which gives, approximately, the

§ 308. Present Value of Wife's Contingent Right of Dower.

—In this case the husband is living, and may survive the wife, and hence the dower right may never arise. But as the wife *may* survive, her inchoate right of dower is regarded as a real and valuable interest, which the husband alone cannot convey, nor his creditors take on execution. Hence the relinquishment by the wife of her inchoate dower is a valuable consideration for a settlement on her by her husband, and is good against his creditors. *Ficklin v. Rixey*, 89 Va. 832 (17 S. E. 325); *Flynn v. Jackson*, 93 Va. 341 (25 S. E. 1); *Allen v. Patrick*, 97 Va. 521 (34 S. E. 451); *Runkle v. Runkle*, 98 Va. 663 (37 S. E. 279); *Glascock v. Brandon*, 35 W. Va. 84 (12 S. E. 1102); *Gore v. Townsend*, 105 N. C. 228 (11 S. E. 160); 8 L. R. A. 443, note.

As the wife may consent to relinquish her inchoate right of dower in consideration of a settlement of property on her, or money paid her, it becomes necessary to ascertain the present value of such right of dower. Here we become involved in the calculus of probabilities. It is not correct to ascertain *separately* the probable duration of the life of the husband and of the wife, and then subtract the husband's expectation of life from the wife's; but from the probability of the life of the wife must be subtracted, not the probability of the life of the husband, but the probability of the *joint* life of both. Then the proper rule for computing the present value of the wife's contingent right of dower is to "ascertain the present value of an annuity for her life, equal to the interest in the third of the proceeds of the estate to which her contingent right of dower attaches, and then to deduct from the present value of the annuity for her life, the value of a similar annuity depending on the joint lives of herself and her husband; and the difference between these two sums

probable duration of the life in question. Thus, supposing one to be of the age of fifty, his probable expectation of life is expressed by $\frac{86-50}{5} = \frac{36}{5} = 18$. De Moivre on Chances and Annuities, 265, 283."

will be the present value of her contingent right of dower." *Per* Chancellor Walworth in *Jackson v. Edwards*, 7 Paige (N. Y.) 386. See in accord, *Gordon v. Tweedy*, 74 Ala. 232 (49 Am. Rep. 813); *Strayer v. Long*, 86 Va. 557 (10 S. E. 574); *Barton v. Brent*, 87 Va. 385 (13 S. E. 29); 8 L. R. A., 443, note. See, also, 3 Va. Law Reg. 69-80 (full discussion and tables); *Lancaster v. Lancaster*, 78 Ky. 198; *Darling v. Hanks*, (Ky.), 42 S. W. 1130; 2 Scribner, *Dower* (2d ed.), 820-824.¹

§ 309. **For What Proportion of the Principal of a Mortgage Debt is the Widow Liable as Between Herself and the Heirs.**—This question supposes that the mortgage is paramount to dower; that the *land* is liable to pay the mortgage (the debt not being contracted by the husband, but the land bought subject to the lien; or, if contracted by him, there being no *personalty* out of which to discharge it); that the mortgage is foreclosed, or if not, that the widow consents to pay her part of the principal, instead of paying, as long as she lives, one-third of the interest on the debt. See *Alexander v. Byrd*, 85 Va. 690 (8 S. E. 577); *Scott v. Ashlin*, 86 Va. 581 (10 S. E. 751); *Pleasants v. Flood*, 89 Va. 96 (15 S. E. 504); *Kilbreth v. Roots*, 33 W. Va. 600 (11 S. E. 21); *Blair v. Mounts*, 41 W. Va. 706 (24 S. E. 620); *Shobe v. Brinson*, 148 Ind. 285 (47 N. E. 625); *Burnet v. Burnet*, 46 N. J. Eq. 144 (18 Atl. 374); *Hodges v. Phinney*, 106 Mich. 537 (64 N. W. 477).

Upon the above suppositions, the widow's liability is thus clearly stated in *Harper v. Vaughn*, 87 Va. 426, 430 (12 S. E. 785): "If the annual interest is to be paid, then the

¹ **INSANE WIFE. EXTINGUISHMENT OF CONTINGENT DOWER.**—See Acts Va. 1895-6, p. 260, ch. 226, amending C. V., § 2625, providing for the release to a purchaser of the contingent right of dower of an insane wife, when the husband wishes to sell his land, and for compensation to the wife for such right. For the procedure under the statute, see *Hess v. Gayle*, 93 Va. 467 (25 S. E. 533), deciding that the wife must be made a party, and have notice. And see as to the New Jersey statute, *In re Alexander*, 53 N. J. Eq. 96 (30 Atl. 817).

widow is to pay one-third of the annual interest, as she has one-third of the land. If the principal is to be paid, as in this case, the widow is not required to pay one-third of the principal, because she does not hold one-third of the land in fee, but only for life, and the amount which she is to pay is based on her life interest; and the heirs are to pay the residue, because they receive not only the two-thirds in fee, but the remainder of the one-third at the death of the wife; that is, they receive the whole after the one-third for the life of the widow has been taken out. The amount which the widow is to pay, as her contribution to the principal, is such a sum as would equal the aggregate of her payments of annual interest (if she were to pay it during her life), reduced to cash, calculated at compound interest. The calculation is made by taking from the tables of mortality her probable duration of life, and, having thus ascertained approximately for how many years she would continue to pay the annual interest, the present cash value at compound interest, of each payment [is] to be estimated, and the aggregate is the amount the widow must contribute." For mode of ascertaining present value see section 307, *ante*. See, also, *Allen v. De Groodt*, 98 Mo. 159 (14 Am. St. Rep. 626, and note, p. 634) *Damm v. Damm*, 109 Mich. 619 (63 Am. St. Rep. 601, and note, p. 604).

§ 310. **Dower When the Husband's Estate of Inheritance Terminates in His Lifetime, or at His Death.**—Dower in some cases continues beyond the estate of the husband; while in others it is defeated by the ending of the husband's estate, in accordance with the maxim *cessante statu primitivo, cessat atque derivatus*.

The general principle is, that if the husband's estate ends at the expiration of the period originally marked out for its duration—by a natural death according to its limitation—then dower attaches by way of prolongation of the husband's estate, on the presumption that this was impliedly included in the original grant; but if the estate of the husband does

not expire by limitation, but is divested or forfeited—dies a violent death—then there can be no presumption of prolongation, and the widow's dower falls with her husband's inheritance. In the former case, the mistletoe may survive the death of the oak, but not in the latter.

The application of the above principle is plain except in two cases—viz., (1) base or qualified fees, beyond whose termination dower does not continue; and (2), shifting fees, which pass from the husband, at his death, to another, by way of executory interest, on a certain condition or event, but which are subject to the widow's dower.¹

¹DOWER IN SHIFTING FEES. DOES WIDOW'S RIGHT ENURE TO PURCHASER?—It is settled, both in Virginia and West Virginia, when there is a devise: "To B and his heirs; but if B dies without issue living at his death, then to C and his heirs"; that if B dies without such issue, the widow of B is dowerable against C, the executory devisee. But suppose B has sold and conveyed his fee simple to D, B's wife uniting in the deed, which is duly recorded, and that B dies without issue living at his death; does the dower right which B's widow would have had against C if the land had not been sold, or if she had not united in the deed to D, enure to D, so that he can hold one-third of the land against C while the widow lives? This question is answered in the affirmative in *Nickell v. Tomlinson*, 27 W. Va. 697, in an elaborate opinion by Green, J., disapproving of the decision in *Corr v. Porter*, 33 Gratt. 278, where Staples, J., reached the conclusion that the relinquishment by B's widow of her inchoate dower right, by uniting with her husband in his deed to D, could in no wise, on her husband's death without issue, enure to the benefit of D as against C.

The view of Judge Staples is based on the nature of the inchoate dower right, and the effect on it of the wife's uniting in her husband's deed, as is set forth in note 1, p. 438, *ante*, and on p. 481, *ante*.

In the opinion of Green, J., it is said: "This dower estate of a wife in a defeasible estate of her husband determinable upon his death without children, is, whether he died without children or not, but a continuation of her husband's estate, a part and parcel of it, and not an estate separate and distinct from the husband's; and therefore upon the principles which we have laid down, as well as those laid down by Judge Staples, in his views

For further comment on these cases, see §§ 311, 312, and notes. For elaborate discussion of the whole subject, see 1 Scribner, Dower, 286-320; 1 Bishop, Married Women, §§ 312, 313; 1 Washburn, Real Prop. (5th ed.), 271-276. For "Base or Qualified Fees," see § 37, *ante*; for "Shifting Fees," see §§ 210-212, *ante*.

§ 311. Cases in Which the Widow Has Dower, Although the Husband's Estate of Inheritance Has Come to an End.—These are three in number:

1. When the husband is seised of an estate in fee simple which escheats at his death for want of heirs. In this case the widow is dowerable at common law. The estate expires by its regular and natural limitation, and the estate of the widow is regarded as the mere prolongation of the estate of the husband. 1 Scribner, Dower (2d ed.), 286. But now, in Virginia, the statute of descents, in default of all other heirs, allows husband or wife to be heir to each other (§ 71, *ante*). So, in the above case, the widow in Virginia becomes the husband's heir, and takes, not dower, but the fee simple by descent.

2. When the husband is seised of an estate-tail, which ends at his death for want of heirs of his body. At common

above quoted, there is no reason why this dower estate, or this right of dower, should not be vested in the grantee by the wife uniting with her husband in conveying such an estate to a purchaser. It is still true that by uniting with her husband she simply *relinquishes* a contingent right in the nature of an incumbrance upon the land conveyed." And he adds that the West Virginia statute [same in Virginia] should be so construed as to enable the husband to sell and convey his defeasible estate to the greatest advantage, if in so doing the dower estate or interest of the wife in the land be not separated from the husband's estate in the land. And this is done by construing the deed of husband and wife conveying a defeasible estate to a purchaser as vesting in him whatever estate or right, either vested or contingent, either of them had in such land.

law the widow is dowable upon the same principle as under (1) above. *Paine's Case*, 8 Coke, 34 b; 1 Scribner, Dower, 287. See 1 Washburn, Real Prop., 271, where it is said of this case: "It having been an estate of inheritance in the tenant [in tail], his widow, if he dies [without issue], will be entitled to dower, it being by implication of law annexed to such an estate as an incidental part of it—a portion of the quantity of enjoyment designated by the terms of the limitation itself." It may be added, that the widow was dowable of a "fee conditional at common law," though it ended on the death of her husband without issue. See 1 Scribner, Dower, 305-7; § 38, *ante*. This estate still exists in South Carolina. *Selman v. Robertson*, 46 S. C. 262 (24 S. E. 187); *Bethea v. Bethea*, 48 S. C. 440; 26 S. E. 716).¹

3. When the husband is seised of an estate in fee simple which is so limited, by way of executory use or executory devise, as to shift, at his death, to another. In this case the widow, by the great weight of authority, is entitled to dower. Thus, if there is a devise by A "to B (the husband) and his heirs; but if B shall die without issue living at his death,

¹ FEES CONDITIONAL IN SOUTH CAROLINA.—In the cases above cited, there was no question of dower or curtesy, but the court held that a devise "to A and the heirs of his body," or "to A and the lawful issue of his body," gives to A a fee conditional, which, after birth of issue, A can alienate by deed in his life time. Also that, in such cases, a limitation, "if A die without issue living at his death, then to B and his heirs," is good as an executory devise.

But the question as to curtesy in a fee conditional was raised in *Wright v. Herron*, 5 Rich. Eq. 441 (S. C. 6 Rich. Eq. 406), and the members of the Court of Errors were equally divided as to whether in South Carolina there was curtesy at all in a conditional fee, and "remanded the case to the Chancellors for their own disposition," who gave the husband curtesy. No later case in South Carolina has been found; but to the writer there occurs no reason why the surviving husband should not have curtesy in a conditional fee of the wife, both when she leaves issue, and when it terminates at her death for want of issue, the issue born alive to the wife dying in her life time.

then to C and his heirs": here on the death of B without such issue the fee simple shifts from B to C, but subject nevertheless to a dower right in favor of the widow of B. The same question, *mutatis mutandis*, arises as to the surviving husband's curtesy (supposing there was issue born alive), and has been decided in favor of the husband's right. The doctrine has, however, been questioned by text-writers of eminence, as contrary to principle. See, in favor of the right to dower, or curtesy, in Shifting Fees, the following cases: *Buckworth v. Thirkell*, 3 Bos. & Pul. 652, note (leading case decided by Lord Mansfield); *Moody v. King*, 2 Bing. 447 (9 E. C. L. R. 475); *Taliaferro v. Burwell*, 4 Call (Va.) 321; *Jones v. Hughes*, 27 Grat. 560; *Medley v. Medley*, Ib. 568; *Corr v. Porter*, 33 Grat. 278; *Snyder v. Grandstaff*, 96 Va.; 473 (31 S. E. 647); *Tomlinson v. Nickell*, 24 W. Va. 148; *Nickell v. Tomlinson*, 27 Id. 697; *Evans v. Evans*, 9 Pa. St. 190; *Thornton v. Krepps*, 37 Pa. St. 391 (distinguished in *McMasters v. Negley*, 152 Pa. St. 303 (25 Atl. 640)); *Hatfield v. Sneden*, 54 N. Y. 80; *Northcutt v. Whipp* 12 B. Monroe 65; *Webb v. Trustees*, 11 Ky. Law 26 (13 S. W. 362); *Pollard v. Slaughter*, 92 N. C. 72 (53 Am. Rep. 402). *Contra*: *Milledge v. Lamar*, 4 Dess. (S. C.) 617; *Kennedy v. Kennedy*, 5 Dutcher (N. J.) 185; *Edwards v. Bibb*, 54 Ala. 475.¹

¹ DOWER AND CURTESY IN SHIFTING FEES.—Whether, on principle dower or curtesy should be allowed in a fee simple estate, defeasible on an event which, *ipso facto*, transfers the estate to another, is one of the difficult problems of the law, and has provoked much discussion. At present the right to dower or curtesy in this case is settled by an almost unbroken line of decisions, but it may not be amiss to consider briefly upon what grounds the right has been upheld.

Referring to the test laid down in § 310, *ante*, can it be said, in case of an executory devise of a fee on a fee—the second fee to supplant the first on some event or condition—that the first fee (in which dower or curtesy is claimed)—“ends at the expiration of the period originally marked out for its duration, by a natural death, according to its limitations”? Professor Minor

§ 312. Cases in Which There is no Dower on the Ending of the Husband's Inheritance.—These are three in number:

1. When the husband is seised of land, of which he is evicted during coverture by the title paramount of a third person. In this case, as the husband was never rightfully seised, the recovery of the land by the true owner, which destroys *ab initio* the husband's apparent title, must preclude dower also.

seems to be of this opinion, declaring that, in the case under consideration, "the husband is entitled to curtesy, notwithstanding the determination of his wife's estate, because it is terminated by the regular efflux of one of the periods marked for its duration, and in a manner which does not affect her previous seisin." And it seems that this was Lord Mansfield's *ratio decidendi* in *Buckworth v. Thirkell*, *supra*. On the other hand, this view of "regular efflux" is derided by Park (on Dower, 178), who says: "It is certainly inconsistent with all ideas entertained in modern practice to consider an estate originally limited in fee, and abridged by a subsequent limitation over on the happening of a particular event, in any such light as that implied by the observation that it was *spent* upon the happening of that event."

If we accept Park's view as the better (as to the writer seems necessary), then the case under discussion cannot come under the general principle above laid down, and must be regarded as exceptional, and resting on its own peculiar ground. The usual explanation, by judges and text-writers, is thus stated by Marshall, J., in *Northcut v. Whipp*, 12 B. Monroe (Ky.) 65, 74, decided in 1851: "Here W. L. Northcut [the husband] had in the land devised to him an estate in fee, defeasible, indeed, on the contingency of his death without leaving lawful issue, but which was an estate of inheritance in him up to the last moment of his life, and which, unless aliened by him, not only might, but must, have descended on his death to any issue of the marriage then living. . . . Here, as in the case of an estate-tail, the husband may rightfully enjoy the estate during his life, and at his death it is continued in his heirs, if there be any of the designated character. And as the possibility that the wife might have had issue that might have inherited is sufficient, though there be no such issue in fact, to sustain the right of dower, it would seem clear, upon analogy, that, under the rule stated by Littleton, the possibility of such issue should sustain the right in this case of a defeasible fee in the husband." This reasoning

1 Scribner, Dower, 290; 1 Washburn, Real Prop. 267; 2 Min. Ins. (4th ed.) 132. Thus in *Glos v. Gerrity*, 190 Ill. 545 (60 N. E. 833), it was held that on the cancellation of a tax deed, as a cloud on the plaintiff's title, it was proper to decree that the defendant's wife was without interest in the premises, since the inchoate dower right of the wife ended with the termination of the defendant's seisin.

2. When the husband is seised of land of which he is evicted during the coverture by the entry of the grantor to enforce a forfeiture by reason of breach of a condition subsequent. In this case, as the seisin of the husband is annulled *ab initio*, the effect must be to preclude dower. See p. 382, *ante*, note; 1 Scribner on Dower, 290; *Beardslee v. Beardslee*, 5 Barb. (N. Y.) 325; *Black v. Elkhorn, &c. Co.*, 163 U. S. 445, 452.

3. When the husband is seised of a base, qualified, or determinable fee, which ends on the happening of the contingency. For examples of such fees, see § 37, *ante*. In this case, it seems that there is neither dower nor curtesy after the happening of the contingent event, which ends the estate; though the fact that the estate is base or determinable does not prevent it from being subject to dower or curtesy while it continues to exist. 1 Scribner, Dower, 290, 297; 1 Washburn, Real Prop., 268; *Seymour's Case*, 10 Coke 96.

The above doctrine, as stated by Washburn, that "where the husband is seised of a base or determinable fee, and the same is determined by the happening of the event upon which it is limited, the right of dower on the part of the

is objected to by Park (on Dower, 181) on grounds which seem cogent, but the discussion is too long to be reproduced here.

Another ground for the doctrine under consideration is thus stated by Preston (3 Prest. Abst. 373), and is adopted as the only satisfactory ground by Gibson, C. J., in *Evans v. Evans*, 9 Pa. St. 190: "The cases of dower of estates determined by executory devise and springing use owe their existence to the circumstance that these limitations are not governed by common law principles; and when the limitation over was allowed to be valid

wife or widow thereupon ceases," rests upon slight authority, though it has been received without question by the text-writers generally. Professor Minor, however, declares the doctrine unsound on principle, and that Seymour's Case, *ante*, on which it is supposed to rest, does not really sustain it. 2 Min. Ins. (4th ed.) 130. Undoubtedly, the ending of a

against the former donee, it was on the terms that the limitation over should not impeach the title of dower of the wife of that donee." Of this statement Park remarks dryly (on Dower, 183): "The writer has not hitherto been so fortunate as to meet with the passages in the books from which this proposition is collected."

On the whole, the doctrine under consideration seems to have been introduced either through misapprehension, or by forced analogy, or simply as a stretch of judicial favor. It is approved, however, by Washburn, Bishop, and Scribner. (See § 310, *ante*, for citations.) The latter thus concludes an extended discussion (1 Scribner, Dower, 319, 320): "There seems to be a marked distinction between a case where, by the terms of the limitation, the husband takes a fee simple estate, which, if he have issue living at his death, will descend to such issue, and which is limited over only in the event of his death *without issue*, and other cases of conditional limitation. Such a case is closely assimilated in principle to the natural determination of the estate for want of heirs generally, and there seems no good reason why the husband's estate should not be so prolonged as to give the right of dower in the one case as well as the other, particularly as it is allowed to estates-tail under similar circumstances, and also to conditional fees at common law." And he adds: "In all the reported cases in which dower or curtesy has been allowed upon estates of this character, the estate was such that the issue of the wife, had there been any, would have been entitled to take by descent. In the cases in which it was denied, the issue could not have taken by descent." Citing *Sumner v. Partridge* and *Barker v. Barker*, for which see, *ante*, § 286, note 2.

It must be remembered that it is only when the estate in fee shifts from the consort *at death* that there is dower or curtesy. There is neither if it is defeasible on an event that may happen during the coverture. 1 Scribner, Dower, 319, 320. See 1 Bishop, Mar. Wom., § 313, where it is said: "If the estate of the husband determines during his life, there is no pretence that under any attending circumstances the widow can have dower."

base or determinable fee (as is pointed out in § 37, *ante*), is by way of *limitation*, and not condition; it expires at the end of the period originally marked out for its duration; and it would seem, under the general rule laid down in section 310, *ante*, that there should be dower or curtesy by way of prolongation of the husband's estate. It is possible that the anomaly (made more marked by the fact that dower or curtesy does attach to what would be a base fee, if, instead of reverting to the grantor or his heirs, it shifted at the consort's death to another by way of executory limitation) is due to the fact that the event on which a base fee terminates may (and usually does) happen during the coverture; in which case, as we have seen, dower or curtesy is denied, even in a fee which shifts by way of conditional limitation; and a doctrine, proper when applied to these cases, was laid down as applicable to base fees generally. See page 499, *ante* note.

§ 313. **Widow's Quarantine—Definition and Extent.**—By the common law right of dower, the widow, before dower has been assigned her, has no right of entry on the lands of her deceased husband. In order to provide for her a temporary home, it was declared by *Magna Charta* (A. D. 1215) that the widow "may remain in her husband's capital mansion-house forty days after his death, within which time her dower shall be assigned." This privilege of the widow, from the number of the days, was called her *quarantine*. Co. Litt. 34 b; 2 Bl. Com. 135; 2 Min. Ins. (4th ed.) 158; 10 Am. & Eng. Ency. Law 148. And by the subsequent charter of Henry III., the support of the widow, during the forty days, from her husband's estate, was included in her right of quarantine. 2 Scribner, Dower, 55; *Simmons v. Lyles*, 32 Grat. 752.

In the United States, the widow's quarantine has been enlarged by statute, both as to the time of its continuance and as to the property embraced thereunder, the statutes varying in the several States, and from time to time in the same State. Thus the Virginia statute, prior to July 1, 1850

(1 Rev. Code, ch. 107, § 2), was as follows: "And till such dower shall be assigned, it shall be lawful for her [the widow] to remain and continue in the mansion-house, and the messuage or plantation thereto belonging, without being chargeable to pay the heir any rent for the same." This carried quarantine to the farthest limit, both as to time and as to subject-matter. But by the Virginia Code of 1849, taking effect July 1, 1850, quarantine was restricted as to subject-matter, the statute, as reproduced in the Virginia Code of 1887 (§ 2274), reading as follows: "Until her dower is assigned, the widow may hold, occupy, and enjoy the mansion-house and curtilage without charge¹; and, in the meantime, she shall be entitled to demand of the heirs or devisees one-third part of the issues and profits of the other real estate which descended, or was devised to them; of which she is dowerable." This has been further changed by Virginia Acts, 1902-'3-'4, c. 425 (taking effect December 12, 1903), and

¹ QUARANTINE IN THE UNITED STATES.—It will be seen that since July 1, 1850, the right of possession by the widow of her husband's realty, by virtue of quarantine, is restricted in Virginia to the "mansion-house and curtilage," instead of the "mansion house and the messuage or plantation thereto belonging," as under the former law. Many of the statutes of other States still extend quarantine to the *plantation* "connected with" or "belonging to" the mansion-house. Others confine it to the mansion-house and *curtilage*, as under the present Virginia law. See 10 Am. & Eng. Ency. Law, 149; 2 Scribner, Dower, 56, 57.

As to what is embraced under plantation "belonging to," or "connected with" the mansion-house, see *McKaig v. McKaig*, 50 N. J. Eq. 325 (25 Atl. 181); *McAllister v. McAllister*, 37 Ala. 484; *Gentry v. Gentry*, 122 Mo. 202 (26 S. W. 1090). As to the meaning of the word "Curtilage," see 8 Am. & Eng. Ency. Law (2d ed.) 527; 2 Minor's Ins. 5. In *Dungan v. Bryant*, 14 Ky. Law, 675 (20 S. W. 1100), the Kentucky statute is quoted as providing that the widow shall hold by way of quarantine, in addition to the mansion-house, "the yard, garden, the stable and the lot on which it stands, and an orchard, if there is one, adjoining any of the premises aforesaid"—which seems to be an attempt to define "curtilage." As to "messuage," see *Grimes v. Wilson* (Ind.), 4 Blackf. 331; *Orrick v. Robbins*, 34 Mo. 226.

the statute as to quarantine now reads as follows: "Until her dower is assigned, the widow may hold, occupy, and enjoy the mansion-house and curtilage without charge for rent, repairs, taxes, or insurance; and in the meantime she shall be entitled to demand of the heirs, devisees, or alienees, or any of them, one-third part of the issues or profits of the other real estate which descended, or was devised, or passed, to them, of which she is dowable, after deducting the cost of necessary repairs, taxes, and insurance."

The policy of the Virginia statute is to provide a reasonable support for the widow during quarantine, but to shorten its continuance by making it to the interest of the heir to assign dower promptly. For until dower is assigned, the widow has *all* of the mansion-house and curtilage, and one-third of the profits of the other lands, which is more than she would receive by way of dower. The statute thus "puts a coal of fire on the terrapin's back."

§ 314. **Widow's Quarantine—Nature and Incidents.**—When the widow's quarantine continues until her dower is assigned her, as it does in many of the States, it might seem to be an estate of *freehold*, as being "of indefinite duration, with a possibility of lasting for her life." See § 9 *ante*. And this view was once taken in New Jersey. *Ackerman v. Shelp*, 8 N. J. Law, 125; *Craige v. Morris*, 25 N. J. Eq. 467. But the law is now settled that the widow's quarantine interest does not rise to the dignity of a freehold estate, but is in the nature of an estate at will. This is held in *Simmons v. Lyles*, 32 Grat. 752, where it is said by Staples, J.: "Whilst under the statute she has the privilege of occupying the mansion-house, it is at the pleasure of the owner of the fee. He may enter at any time, assign dower, and put an end to her possession and interest. A possession thus held at the will of another is of too precarious a nature to be termed a freehold estate in land. * * * The effect of the statute is merely to extend the quarantine. The object, manifestly, was to coerce the heir to assign dower; and, until this was

done, to protect her in the enjoyment of the homestead and the rents and profits accruing therefrom." And see *Gains v. Crenshaw*, 6 Ala. 873; *Inge v. Murphy*, 14 Ala. 289; *Roach v. Davidson*, 3 Brev. (S. C.) 80; *Spinning v. Spinning*, 41 N. J. Eq. 427 (affirmed 43 N. J. Eq. 215); *Wallis v. Smith*, 10 Miss. 220; *Aiken v. Aiken*, 12 Or. 203 (6 Pac. 682); *Grubbs v. Leyendecker*, 153 Ind. 348 (53 N. E. 940).

The widow's quarantine being merely a privilege of possession, analogous to an estate at will, the question has arisen whether, like an estate at will, it is non-assignable by the widow. On this point the authorities are in conflict. See 2 Scribner, Dower, 64; 10 Am. & Eng. Ency. Law, 148. The general doctrine is that quarantine is a personal privilege of the widow, and incapable of alienation by her, as it is incapable of involuntary alienation by levy and sale for her debts. *Wallis v. Smith*, 10 Miss. 220; *Cook v. Webb*, 18 Ala. 810; *Norton v. Norton*, 94 Ala. 481 (10 South 446); *Grubbs v. Leyendecker*, 153 Ind. 348 (53 N. E. 940). But the contrary view prevails in Missouri and New Jersey. *Stokes v. McAllister*, 2 Mo. 163; *Carey v. West*, 139 Mo. 146 (40 S. W. 661); *Craige v. Morris*, 25 N. J. Eq. 467. And even in those States where the doctrine of non-assignability prevails, there is a disposition to relax its severity in favor of the widow, so as to allow her to receive the rents from a sub-lessee, or from one to whom she gives a permissive possession. *Doe v. Bernard*, 7 Sm. & M. (Miss.) 319; *Inge v. Murphy*, 14 Ala. 289; *Davenport v. Deveneaux*, 45 Ark. 341; *Hyser v. Stoker*, 3 B. Mon. 117. For discussion of the subject, see 2 Scribner, Dower, 64; *Craige v. Morris*, 25 N. J. Eq. 465, 468. In Virginia, in *McReynolds v. Counts*, 9 Grat. 242, it is said of the widow's quarantine: "She might occupy the land herself, or allow another to do it for her. It was therefore error to direct an account of rents and profits whilst it was so held, either by her or by Isaac McReynolds, with her permission." It will be seen that this falls short of deciding that the widow had full power of alienation.

It is well settled that the possession of the widow under her right of quarantine is in privity with, and not adverse to, the heirs or devisees of the husband. *Porter v. Williams*, 3 A. K. Marsh (Ky.) 1113; *Carey v. West*, 139 Mo. 146 (40 S. W. 660); *Hannon v. Hounihan*, 85 Va. 429 (12 S. E. 157); *Hulvey v. Hulvey*, 92 Va. 182 (23 S. E. 233). See, as to the general principle, page 156, note 1, *ante*. But see *Carpenter v. Garrett*, 75 Va. 129, 135, where the widow's possession under her quarantine is spoken of as "in a certain sense adverse," so as to prevent the *actual seisin* of the heir-ess, necessary to give her husband curtesy.

It remains to inquire how the widow's quarantine may terminate. Of course, when its duration is fixed by statute, it expires by efflux of time. And when it is to continue until dower is assigned her, it terminates upon such assignment. The right may also, doubtless, be waived or abandoned by the widow; and an absolute assignment, where she has no power to assign, has been held to work a forfeiture of her quarantine in favor of the heir. *Wallace v. Hall*, 19 Ala. 367. Whether a widow's marriage works a forfeiture of quarantine under the American statutes, as it did in England, is doubtful. Professor Minor (2 Min. Ins. 158) is of opinion that the quarantine would be forfeited in Virginia because the word "widow," used in the statute, "imports a continuance of the state of widowhood, so that if she marries she forfeits the special provision, and can only fall back on her dower." And see 1 Lom. Dig. (91). *Sed quare*. In Alabama and Kentucky, it has been held that the widow's re-marriage does not affect her privilege of quarantine. *Shelton v. Carrol*, 1 Ala. 148; *White v. Clarke*, 7 T. B. Mon. (Ky.) 641. And see 2 Scribner, Dower, 65, where *McReynolds v. Counts*, 9 Grat. 242, is cited for the proposition that in Virginia a widow's marriage does not cause forfeiture of her quarantine, but the case is not in point, unless by rather remote inference.

§ 315. **Widow's Quarantine—Privileges and Obligations.**—Under this head must be considered (1) Rents and Profits (crops, etc.); (2) Taxes; and (3) Interest on Encumbrances.

1. *Rents and Profits.*—As we have seen, the Virginia Statute now declares (p. 504, *ante*), that “until her dower is assigned, the widow may hold, occupy and enjoy the mansion-house and curtilage without charge for rent, repairs, taxes, or insurance.” This is the universal rule as to rent, both when the quarantine is confined to the mansion-house and curtilage, and when it extends also to the plantation “connected with” or “belonging to” the “mansion-house.” And holding the premises “without charge for rent,” the widow is entitled to all the profits derivable therefrom by cultivation (crops, etc.); and if another occupies for her, or as her lessee, paying rent, she is entitled to such rent. If, however, at the husband's death, the premises are in possession of his lessee, the widow's quarantine will not attach until the lease expires. *McReynolds v. Counts*, 9 Grat. (Va.) 242; *Merchant v. Comback*, 41 N. J. Eq. 349 (7 Atl. 633); *Becker v. Carey* (N. J. Eq.), 36 Atl. 770; *Gentry v. Gentry*, 122 Mo. 202 (26 S. W. 1090); *Smith v. Stephens*, 164 Mo. 415 (64 S. W. 260); *Callahan v. Nelson*, 128 Ala. 671 (29 South 555); *Stull v. Graham*, 60 Ark. 461 (46 S. W. 46); *Davis v. Lowden*, 56 N. J. Eq. 126 (38 Atl. 648). But in *Salinger v. Black*, 68 Ark. 449 (60 S. W. 229), it was held that where the widow was also administratrix, and charged herself, in her annual settlements, with the rents of the land to which she was entitled by right of quarantine, she thereby waived her right to such rents, and was not entitled to a credit therefor.

We have seen that the widow is entitled to cultivate the land, and take the crops, during her quarantine. But how as to the crops sown by the husband, and reaped or gathered after his death? On this point, there is but little authority. The question might have arisen in *Grayson v. Moncure*, 1 Leigh (Va.) 449, but the case was disposed of on other grounds. In *Blair v. Murphree*, 81 Ala. 454 (2 South. 18),

the right to crops sown by the husband, which the administrator might have exercised, was under a statute declaring that "the executor or administrator *may* complete and gather a crop commenced by the decedent." On principle, it would seem that the widow's quarantine should entitle her to such crops, just as "where lands which have been sown with corn and grain are assigned to the widow for dower by the heir, she will be entitled to the crops." 2 Scribner, Dower, 89, 778. And, see *Engle v. Engle*, 3 W. Va. 246.

2. *Taxes*.—It is well settled that when dower is assigned to a widow, she is lable for the taxes thereon, as in any other life tenant (32 L. R. A. 744, note). But this principle does not extend to the widow's quarantine, which, as we have seen, is not a freehold estate (§ 314, *ante*); and as between the widow and the heir, the burden of taxes during quarantine, falls on the heir. As is said in *Simmons v. Lyles*, 32 Grat. 752, 758: "In all this the heir has no just cause of complaint. If he is unwilling to pay the taxes while the widow is in occupation of the mansion-house, all he has to do is to assign her dower, and thus relieve himself of the taxes on one-third of the estate." See, in accord, *Spinning v. Spinning*, 41 N. J. Eq. 427 (5 Atl. 278), affirmed in 43 N. J. Eq. 215 (10 Atl. 270); *Smith v. Stephens*, 164 Mo. 415 (64 S. W. 260); 10 Am. & Eng. Ency. Law, 150; 2 Scribner, Dower, 63. But the *land* is liable for taxes by virtue of the State's lien, even when held by right of quarantine.¹ But if, through the default of the heir, the widow, to save her estate, is compelled to pay what the law requires him to pay, she may compel him to refund the amount so paid by her for his benefit. *Simmons v. Lyles*, *ante*.

3. *Interest on Encumbrances*.—It has been seen that when

¹ LIEN FOR TAXES.—The Virginia statute (Acts 1902-3-4, p. 660, set out, in part on p. 504, *ante*), which exempts the widow during quarantine from the payment of the taxes, expressly declares (at the end): "That nothing in this act shall be construed to impair the lien, or delay the enforcement thereof, of the State, city or county for the taxes assessed upon the said property."

dower has been assigned a widow, she must pay the interest on one-third of a mortgage or other encumbrance paramount to dower (§ 309, *ante*). But in the exercise of her right of quarantine, the widow is not bound to pay interest on such encumbrances; and this duty rests on the heir alone. But he can, at any time, devolve upon the widow her proportion of the burden by assigning her dower. *Cronley v. Cronley*, 40 N. J. Eq. 40; *Becker v. Carey*, (N. J. Eq.) 36 Atl. 770; *Gentry v. Gentry*, 122 Mo. 202 (26 S. W. 1090); 10 Am. & Eng. Ency. Law, 150.

As to the widow's *remedies* in the matter of her quarantine, there is great diversity in the several States. The old remedy was a writ *de quarantina habenda*. See *Aiken v. Aiken*, 12 Ir. 203 (6 Pac. 682). The remedy in the United States now is usually unlawful entry or detainer, or ejectment. In Virginia, by the statutes in force since July 1, 1850 (retained in Virginia Acts 1902-3-4, p. 660, amending quarantine): "If she [the widow] be deprived of such mansion-house and curtilage, she may, on complaint of unlawful entry or detainer, recover the possession thereof, with damages for the time she was so deprived."

§ 316. **Widow's Unassigned Dower—Nature and Incidents.**—The nature of the *wife's* inchoate right of dower, during the coverture, has already been discussed (p. 438, *ante*, note; also Z 304). We have now to consider the nature of the *widow's* right to dower, when consummate, indeed, by the death of her husband, but as yet not assigned to her. This is well stated in *Grubbs v. Leyendecker*, 153 Ind. 348 (53 N. E. 940): "The right to have dower assigned, and dower assigned and set apart, are very different matters. The latter does constitute an estate for the life of the dowress. But the right to dower, while it remains unassigned, is not an estate, but a *chose in action*—a consummate *right* merely, not subject to execution, nor to the payment of taxes, nor to lease. By the common law, the widow cannot enter for her dower until it is assigned to her, nor can she alien it so as to

enable the grantee to sue for it in his own name. She has no estate in the land until assignment; and after the expiration of her quarantine [when not *until dower assigned*], the heir may put her out of possession, and drive her to her suit for dower. It is not until her dower has been duly assigned that the widow acquires a vested estate for life, which will enable her to sustain ejectment. She is not in consequence of her right of dower a tenant in common with the heirs or devisees." For these propositions, many cases are cited. See, in accord, 2 Scribner, Dower, 25-51; 10 Am. & Eng. Ency. Law, 146, 148.

1. *No Right of Entry on Unassigned Dower*.—At common law, on the death of the husband, the seisin is cast upon the heir. Until her dower is assigned her, the widow has neither seisin in law, nor a right of entry. *Simmons v. Lyles*, 32 Grat. 752; *Haskell v. Sutton*, 53 W. Va. 206 (44 S. E. 533). This denial of the right of entry to the widow is called by Scribner "an anomaly in the rules of the common law," and is thus explained by him: "The reason of the law in denying any right of entry in the wife [widow], although her *title* is consummate, is to be found in the injustice which would arise from permitting her to be her own judge of the particular lands which she should have for her dower—"to carve for herself," as Gilbert, C. B., expresses it; while, on the other hand, the law in favor of the widow, would not subject her to the inconvenience of holding *an undivided part in common* for her dower, where the nature of the property admitted of an endowment in severalty." 2 Scribner, Dower, 27, 28. And as the widow before assignment of dower has *no estate* in the land, she cannot file a bill for partition, and for sale of the land and dower in the proceeds, if dower in kind be impracticable. She is not a tenant in common with the heir or devisee. *Grubbs v. Leyendecker*, *supra*; *White v. White*, 16 Grat. 264 (80 Am. Dec. 706); *Hurste v. Hotaling*, 20 Neb. 178 (29 N. W. 299); *Walker v. Doane*, 131 Ill. 27 (22 N. E. 1006); *Hull v. Hull*, 26 W. Va. 1; *Hoback v.*

Miller, 44 W. Va. 635 (29 S. E. 1014); *Haskell v. Sutton*, 53 W. Va. 206 (44 S. E. 533).¹

¹ ASSIGNMENT OF DOWER IN A PARTITION SUIT.—For the Virginia statute and decisions as to partition, see §§ 162–164, *ante*, and notes. It is settled that the widow is not a “tenant in common, joint-tenant, or coparcener,” with the heir or devisee, within the usual language of the partition statutes; and she cannot, therefore, by virtue of her right to have dower assigned her file a bill for partition in order to obtain therein either the assignment of her dower in kind, or a sale and dower in the proceeds. Her remedy is in a proceeding brought directly for her dower. See, in addition to authorities cited in § 316, 2 Scribner, *Dower*, 32, 176, note; 21 Am. & Eng. Ency. Law, 1155; *Coles v. Coles*, 15 Johns (N. Y.) 319; *Liederkrantz Society v. Beck*, 8 Bush. (Ky.) 597; *Reynolds v. McCurry*, 100 Ill. 356; 1 Lomax Dig. 92.

It has also been held, under the general statutes of partition, that a widow's right to dower does not make her a proper party defendant to a suit for partition brought by one of the heirs as a coparcener; that her right to dower is paramount, and will attach, on partition, to the shares assigned the heirs in severalty, but that it is no bar to the partition. 21 Am. & Eng. Ency. Law, 1155; 15 Ency. Pl. & Prac. 797; *Bradshaw v. Callaghan*, 5 Johns (N. Y.) 78; S. C. 8 Johns 435; *Ward v. Gardner*, 112 Mass. 42; *Leonard v. Motley*, 75 Me. 418. But this inconvenient rule, which compels the widow to seek her dower in separate suits against the several heirs or devisees, instead of obtaining it, once for all, in the partition proceeding, has been changed by statute in a number of the States. Thus, in Ohio, by statute, in proceedings for partition, a widow entitled to dower must be made a party; and the commissioners who make the partition are required to set off to her the share to which she is entitled. And the same is the law in Illinois and other States. See 2 Scribner, *Dower*, 187, 188; *Barclay v. Kerr*, 110 Pa. St. 130; *Green v. Putnam*, 1 Barb. (N. Y.) 500. And in Virginia it is held, without the aid of statute, that upon a bill filed by an heir for partition, when the widow is alive and entitled to dower, she should be a party to the suit, and her dower should be assigned her, and partition made of the residue; and that it is error to proceed in her absence, and make partition of the land subject to her right of dower. *Custis v. Snead*, 12 Grat. 260. And see *Hurste v. Hotaling*, 20 Neb. 178 (29 N. W. 299).

And in *White v. White*, 16 Grat. (Va.) 264 (80 Am. Dec. 706), it is held, under the *general* powers of a court of equity that where

2. *Unassigned Dower Inalienable by Widow.*—It is well settled that at law, in the absence of statute, a widow's unassigned dower, being no estate, but a right in the nature of a *chose in action*, cannot be conveyed by her, except by way of release to the *terre tenant* (*i. e.*, heir, devisee, or alienee). 2 Scribner, Dower, 42; 10 Am. & Eng. Ency. Law 147. But equity will enforce such an assignment, and the right to assign is sometimes conferred by statute, and has been recognized in some of the Code States. *Brandon v. Wilkinson*, (Ala.) 9 South. 187; *Weaver v. Rush*, 62 Ark. 51 (34 S. W. 256); *Hook v. Garfield Coal Co.*, 112 Ia. 210 (83 N. W. 963); *Union Brewing Co. v. Meier*, 163 Ill. 424 (45 N. E. 264); *Sells v. McAnaw*, 138 Mo. 267 (39 S. W. 779); *Par-ton v. Allison*, 111 N. C. 429 (16 S. E. 415); *Morgan v. Blatchley*, 33 W. Va. 155 (10 S. E. 282).

Most of the above cases, while denying the alienability of unassigned dower at law, recognize that equity will enforce such assignment. That the widow may *release* at law to the *terre tenant*, see *Saunders v. Blythe*, 112 Mo. 1 (20 S. W. 319); *Lewis v. King*, 180 Ill. 259 (54 N. E. 330); *Tucker v. Tucker*, (Tenn.) 45 S. W. 344. In Missouri, the widow's

a widow is made a party defendant to a bill for partition filed by an heir, the court may assign her dower in such suit in kind; or if this be *impracticable*, may decree a sale of the whole property, and assign her dower in the proceeds. (See as to *sale*, § 319, *infra*, and note.) But as the widow is not within the purview of the statute of partition, no power of sale of the whole property is derived therefrom; and if dower in kind be not impracticable, the court cannot order a sale of the whole property under the statute of partition, Code of 1849, ch. 124, § 2, declaring that this may be done "if the interest of the parties will be promoted by a sale of the entire subject." But unless the widow consents to such sale, and a monied compensation out of the proceeds, she must have her dower in kind; and the sale, for division among the heirs, must be of the residue of the property subject to her dower thus assigned; *i. e.*, two-thirds of the estate in fee simple, and the reversion in fee after the life estate of the widow in the other third.

assignee may now, by statute, bring ejectment, in his own name, to have dower assigned. *Cassidy v. Pound*, 167 Mo. 605 (67 S. W. 283). In Minnesota, the widow's assignee may, under the Code, sue in his own name. *Dobberstein v. Murphy*, 64 Minn. 127 (66 N. W. 204). See, also, *Strong v. Clem*, 12 Ind. 37 (74 Am. Dec. 200); *Payne v. Becker*, 87 N. Y. 153; *Serry v. Curry*, 26 Neb. 353 (4 N. W. 97). But in *Galbraith v. Fleming*, 60 Mich. 403 (27 N. W. 583), it is held that the statute empowering any assignee of any chose in action to sue and recover in his own name does not authorize the assignee of a widow's unassigned dower to bring ejectment against the heir to compel its assignment.

3. *Unassigned Dower is not Liable at Law for the Widow's Debts.*—It is settled that unassigned dower, for the same reasons that it is not alienable at law by the widow, is not liable to involuntary alienation at law, by levy and sale on execution, for the widow's debts. 2 Scribner, Dower, 39; 23 L. R. A. 647, note. But in Missouri it is provided by statute that a creditor of a widow may have her dower assigned, and thus render it liable to execution at law for her debts. *Waller v. Mardus*, 29 Mo. 25.

Whether in equity a widow's unassigned right of dower can be, by creditors' bill or otherwise, subjected to the payment of her debts, in the absence of a statute authorizing it, is a much-mooted question. In recent decisions, the answer has been thought to depend on whether equity, in the absence of statute, can subject *choses in action* to the payment of debts—itself a disputed point. The trend of authority is at present against the right of equity, in the absence of statute, to subject her unassigned dower to the payment of a widow's debts. See, on the whole subject, 2 Scribner, Dower, 47; 2 Pom. Eq. (2d ed.), § 1383; *Ager v. Murray*, 105 U. S. 126, 129; *Greene v. Keene*, 14 R. I. 388 (51 Am. Rep. 400); *Maxon v. Gray*, 14 R. I. 641; *Maxon v. Bishop*, 15 R. I. 475 (8 Atl. 696); *Boltz v. Stoltz*, 41 Ohio, 540; *Payne v. Becker*, 87 N. Y. 153; *McMahon v. Gray*, 150 Mass. 289 (22 N. E. 923, 15 Am. St. Rep. 202, 5 L. R. A. 748); *Harper v. Clay-*

ton, 84 Md. 346 (35 Atl. 1083, 57 Am. St. Rep. 407, 35 L. R. A. 211); *Baer v. Ballingall*, 37 Or. 416 (61 Pac. 852).

§ 317. **Assignment of Dower—Procedure.**—By Virginia Acts 1895-'96, c. 270, p. 309, amending § 2275 of the Code of 1887: "Dower may be assigned as at common law; or, upon the motion of the heirs, devisees, or alienees, or any of them, the court in which the will of the husband is admitted to record, or administration of his estate is granted, or the conveyance of the alienee is recorded, may appoint commissioners by whom the dower may be assigned, and the assignment, when confirmed by the court, shall have the same effect as if made by the heir at common law; but nothing herein contained shall be construed to take away or affect the jurisdiction which courts of chancery now exercise on the subject of dower."

At common law an action of ejectment would not lie to recover dower because, before assignment, the widow had no right of entry (§ 316, *ante*). But this is changed in Virginia by Code 1849, c. 110, § 10 (Code 1887, § 2276), declaring: "A widow having a right of dower in any real estate may recover the said dower, and damages for its being withheld, by such remedy at law as would lie on behalf of a tenant for life having a right of entry." And by Code 1887, § 2750: "If the action [ejectment] be brought to recover dower, which has not been assigned before the commencement of such action, the court in which the judgment is rendered may have dower assigned by commissioners appointed for that purpose." 2 Min. Ins. 162; *Hulvey v. Hulvey*, 92 Va. 182. For recovery of dower by ejectment under the statutes of other States, see 10 Am. & Eng. Ency. Law, 173; 7 Ency. Pl. & Prac. 284; 18 L. R. A. 790, note.

The old actions to recover dower—viz., the writ of right of dower, and the writ of dower *unde nihil habet*, are abolished or obsolete in the United States generally (7 Ency. Pl. and Prac. 284; 2 Min. Ins. (4th ed.) 161); and the modes of assignment of dower, besides ejectment above referred to,

are (as recognized by the Virginia statute above) three in number: (1) by the tenant of the freehold, as at common law; (2) by summary proceeding in court on motion; and (3) by a bill in equity. Of these in their order:

1. *Dower Assigned in Pais by the Tenant of the Freehold*.—It is well settled at common law that immediately on the husband's death the duty devolves upon the heir or other tenant of the freehold to assign the widow her dower; and that this may be done *in pais*, without resort to judicial proceedings. Moreover, the assignment may be by parol, Coke Litt. 35a; *Pearce v. Pearce*, 184 Ill. 289 (56 N. E. 311); and though the widow thereby becomes seised of a freehold estate, no livery of seisin is necessary. For, as stated by Park (on Dower, 269): "Although no estate is vested in the dowress until the certainty of the land is ascertained by assignment, yet as the estate, although suspended in the meantime, does not *pass* by the assignment, but the dowress is *in*, in intendment of law, by her husband, neither livery nor writing is essential to the validity of the assignment." (See § 288, *ante*).

But only the tenant of the freehold could thus voluntarily assign dower, as indeed only such tenant was legally compellable to assign it. This doctrine grew out of the nature of the real actions for the recovery of dower, and was intended for the protection of the inheritance. It is, however, still law, unless changed by statute; and, therefore, a tenant for years cannot assign dower. *Drost v. Hall*, 52 N. J. Eq. 68 (28 Atl. 81). But dower may be assigned by the heir, devisee, alienee of the husband, alienee of the heir, and even by a disseisor. See, on the whole subject, Coke Litt. 35a; 2 Scribner, Dower, pp. 71-89; 10 Am. & Eng. Ency. Law, 171-2; *Austin v. Austin*, 50 Me. 74 (79 Am. Dec. 597, and note, p. 600); 39 Am. St. Rep. 32, note; *Miller v. Beverly*, 1 H. & M. (Va.) 367; *Moore v. Waller*, 2 Rand. (Va.) 418; *Lenfers v. Henke*, 73 Ill. 405 (24 Am. Rep. 263); *Robinson v. Miller*, 1 B. Mon. (Ky.) 88.¹

¹ DOWER ASSIGNED IN PAIS BY THE TENANT OF THE FREEHOLD—

2. *Dower Assigned by Summary Proceeding in Court on Motion.*—The Virginia statute is set out above, § 317. Similar statutes are found in the United States generally, providing a summary note for obtaining the assignment of dower by application to courts having jurisdiction of probate

MUST WIDOW ASSENT THERETO?—There is no doubt that the assignment of dower *against common right* (see § 318, post) is not binding on the widow without her acceptance (Park, Dower, 266; Roper, Husband and Wife, 392; 2 Scribner, Dower, 82); but whether her acceptance is necessary when the heir, or other tenant of the freehold, assigns her dower *according to common right* (c. g., in kind, by metes and bounds, in the land itself of which she is dowable) appears uncertain. That the assignment when made *according to common right* is good without the widow's assent is inferable from the above authorities declaring that when *against common right* it must be made *with* the widow's assent, but prescribing no such condition in the former case. On the other hand, Lord Coke (Coke Litt. 32 b; 2 Tho. Co. 589) says of dower at common law: "There must be assignment, either by the sheriff, by the King's writ, or else by the heir or other tenant of the land, by consent and agreement between them"; i. e., consent and agreement between the widow and heir. And that the widow's consent is necessary, see, also, *Austin v. Austin*, 50 Me. 74 (79 Am. Dec. 597); *Clark v. Muzzey*, 43 N. H. 59; 10 Am. & Eng. Ency. Law, 172.

The true doctrine (in the absence of statute requiring the widow's consent, (as to which see 2 Scribner, Dower, 72) is believed to be that the heir's (or other *terre tenant's*) assignment of dower to the widow, according to common right, does not require her assent to be *prima facie* valid and binding; but nevertheless, if she has not assented to it, she may set it aside if it be inadequate or unfair. This much could hardly be denied the widow, as the dower is assigned her by one whose interest is adverse to hers. Thus Blackstone says (2 Com. 136): "If the heir or his guardian do not assign her dower within the term of quarantine, or do assign it *unfairly*, she has her remedy at law, and the sheriff is appointed to assign." And in 2 Scribner, Dower, 71, it is said: "The person on whom the right or duty is devolved of making the assignment may at once proceed to set apart to the widow her proportion of the estate; and, *if this be fairly done*, it is as effectual and binding as if performed under a judgment or decree of the court." This certainly implies that if *not* fairly done, the widow is not bound, unless indeed she is estopped by her accept-

matters. See 2 Scribner, Dower, 175-204; 7 Ency. Pl. & Prac. 186. The Virginia statute is part of the revision of 1849, and gives legislative sanction to a proceeding already in vogue, and which had been approved by the Court of Appeals as tantamount to the heir's assignment at common law. See *Moore v. Waller*, 2 Rand. 418, 422, where it is said: "It is no objection that the assignment in this case was made by commissioners, under an order of the county court. That order was made at the instance of the heir, and the assignment by them was his assignment." And, see Report of Revisors, 1849, p. 566, note. But it is held in Virginia that the motion, following the language of the statute, must be made by the "heirs, devisees, or alienees, or any of them," and *cannot be made by the widow*. *Raper v. Sanders*, 21 Grat. 74; *Helm v. Helm*, 30 Grat. 404, 414. And, see *Jones v. Fox*, 20 W. Va. 3770. But the objection that the motion was not made by an heir, devisee, or alienee, cannot be made for the first time in an appellate court. *Parrish v. Parrish*, 88 Va. 529, 532.

3. *Dower Assigned by Bill in Equity*.—It is now settled that equity has, in all cases, concurrent jurisdiction with courts of law to assign dower in legal estates, and exclusive jurisdiction over dower in equitable estates. 2 Scribner, Dower, 145-173. And, see 2 Pom. Eq., § 1382, where it is said: "Although it was at one time supposed that the jurisdiction of equity was ancillary, and could not attach in the absence of impediments at law, it is now well settled that courts of equity have concurrent jurisdiction in cases of legal dower, or dower in legal estates. The advantages of equitable procedure are obvious. An outstanding term could be removed and satisfied; a partition in the case of undivided interests could be decreed, and an account could be taken;

ance. And in *Moore v. Waller*, 2 Rand. (Va.) 418, it is said: "The widow is bound to accept an assignment made by him [the heir], provided it be a *full and just* assignment." For discussion of the subject, see note to *Sanders v. McMillian* (Ala.) 39 Am. St. Rep. 32.

fraudulent conveyances could be cancelled; and antagonistic claims to the subject matter could be determined without multiplicity of suits." And see *Campbell v. Murphy*, 55 N. C., 357.

In Virginia, the Act of 1895-'96, c. 270, providing for proceeding to assign dower on motion (§ 317, *ante*) expressly preserves the jurisdiction of courts of chancery. And, C. V., § 2276 (p. 516 *ante*), providing that a widow may bring ejectment for the assignment of her dower also expressly declares, as an alternative, that she "may recover the said dower and damages for its being withheld by a bill in equity, where the case is such that a bill would now lie for dower"—which Professor Minor believes (no doubt correctly) to be "in *all* cases." See 2 Min. Ins. (4th ed.) 162. Also, *Campbell v. Murphy*, 55 N. C. 357.

§ 318. Dower According to Common Right.—This signifies the widow's right of dower by the common law, to which she is entitled of common right, unless by agreement with the heir, or other *terre* tenant, she has waived her common-law right, and consented to be otherwise endowed. When this is the case, she is said to be endowed *against common right*. 2 Tho. Co. 459-462; Park on Dower, 250; 1 Roper, H. & W. 236; 2 Scribner, Dower, 80.

The widow's common-law right of dower is thus stated by Littleton (§ 36): "The wife, after the decease of her husband, shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture, to have and to hold to the same wife in severalty by metes and bounds for term of her life." This is dower *in kind* (*i. e.*, parcel of the lands themselves); and this is still recognized as the dower right of the wife, unless it be *impracticable* to accord her possession in severalty, by metes and bounds, of that of which she is dowable.¹ When dower in

¹ DOWER IN KIND.—In the quotation from Littleton above, it is said that "the wife shall be endowed of the third part of such lands and tenements," etc. But this does not mean the third part

kind is impracticable, the common law provides a different mode of endowment; but this different mode is still "according to common right," because the widow has no right to be otherwise endowed. When, however, dower in kind is practicable, then any other mode of endowment is "against common right."

Thus Lord Coke, after quoting Littleton as above, says (2 Tho. Co. 581): "Albeit, of many inheritances that be entire, whereof no division can be made by metes and bounds,

of the lands by measurement merely (as 100 acres out of 300), nor the third part of the fee simple value; for, in the first place, the land assigned the widow might be barren and well-nigh worthless, and, in the second place, though its fee simple value might be great (as unimproved property in a city), yet little or no income might be derivable therefrom. And the law looks to the annual produce or income as a provision for the widow's support.

The rule as to assignment is thus laid down in *Leonard v. Leonard*, 4 Mass. 533: "In the assignment of dower, commissioners are to regard the rents and profits only of the several parcels of the estate out of which dower is to be assigned. When they have ascertained the annual income of the whole estate, they ought to set off to the widow such a part as will yield her one-third part of such income, in parcels best calculated for the convenience of herself and of the heirs. This rule is adapted equally to protect widows from having an unproductive part of the estate assigned to them, and to guard heirs from being left, during the life of the widow, without means of support." See, in accord, 1 Bishop, Mar. Wom. § 334; 2 Scribner, Dower, 599; 10 Am. & Eng. Ency. Law, 185; 39 Am. St. Rep. p. 35 note; *Smith v. Smith*, 5 Dana (Ky.) 179; *Devaughn v. Devaughn*, 19 Grat. 556, 557.

In *Fuller v. Conrad*, 94 Va. 233 (26 S. E. 575) the court, after quoting with approval the rule laid down in *Leonard v. Leonard*, *supra*, proceeds as follows: "These principles have not been observed in this case. The court in its decree, and the commissioners in their report, seem to have regarded the fee simple value alone in determining the widow's rights. The estate in which the appellant is entitled to dower is valued at \$69,750, and consists almost entirely of highly improved city property. Of this \$23,250 in fee simple value is assigned the widow, in which assignment is included the only property without power to produce income belonging to the estate, valued at \$6,250, thus imposing upon the

yet a woman shall be endowed thereof in a special and certain manner. As of a mill, the widow shall not be endowed by metes and bounds, nor in common with the heir, but either she shall be endowed of the third toll dish, or of the entire mill for every third month."¹ This is evidently considered by Coke to be dower according to common right, and it is so treated by both Park (on Dower, 115) and Roper (on Husband and wife, 239). Here dower in kind is impracticable,

widow a burden in taxes, without the benefit of any income, from more than one-fourth of the property assigned her, while all of the \$46,500 worth of property reserved to the heirs has income producing capacity. The record clearly shows that under the division made the appellant falls short of getting her just proportion of the estate in rental value."

As a detail of assignment it may be added that it is well settled that, in the absence of statute, the widow cannot demand as a matter of right that the mansion-house be included in her dower, though this is usually and properly done if the widow desires it. Quarantine gives a right to the possession of the mansion-house (§ 313, *ante*), but not dower. Park on Dower, 254; 2 Scribner, Dower, 81, 600; 39 Am. St. Rep. 34, note; *Taylor v. Lusk*, 7 J. J. Marsh (Ky.), 636; *Dungan v. Bryant*, 20 S. W. 1100; *Devaughn v. Devaughn*, 19 Grat. 556.

¹ SPECIAL ENDOWMENT.—Coke adds to the quotation above: "A woman shall be endowed or the third part of the profits of stallage [*i. e.*, liberty of having stalls in a fair or market]; of the third part of the profits of a fair; of the third part of the profits of the office of marshal-sea; of the third part of the profits of the keeping of a park; of the third part of the profits of a dove-house; and likewise of the third part of a piscary—viz., the third fish or the third cast of the net; of the third presentation to an advowson." And, see *Macaulay v. Dismal Swamp Land Co.*, 2 Rob. (Va.) 507, 524, where it is said of the widow's dower: "Her essential right is to the profits of one-third of her husband's real estate of inheritance, whereof he was seised at any time during the coverture; and she is entitled for that purpose to the several possession of one-third of the subject, if susceptible of a division by metes and bounds. If the subject be not so partible, still she is admitted to her due participation of the profits; and the mode of enjoyment is adapted to the nature of the case. The nature of the property [*i. e.*, whether corporeal or incorporeal, see §§ 5, 6,

from the nature of the *property*. But it may also be impracticable from the nature of the husband's *estate* in the property, as when he dies seised of land held in common or in coparcenary. Here the wife cannot have her dower assigned by metes and bounds in severalty; but an undivided third part of the share of her husband is assigned her to hold in common with the husband's heir, and the other co-tenant or co-tenants. Park, on Dower, 115; 2 Scribner, Dower, 80; *Parrish v. Parrish*, 85 Va. 529 (14 S. E. 529). And yet this is dower "according to common right," because dower in kind is impracticable.¹

ante] is wholly immaterial as regards the right to dower, provided it be, or savor of, the realty; and this is equally true in regard to the nature of its products. Thus a widow is dowable of lands, whether arable, meadow, or woodland; of manors, houses, mills, and factories; of rents, whether rent-charge, rent-seck, or rent-service; of dove-cotes and warrens; of fairs, markets, ferries, and fisheries; of common, certain, gross, or appendant; of advowsons, gross, or appendant; of tithes, of shares in road or navigation companies," etc. As to the dower in "shares of road and navigation companies," this is, of course, when by statute such shares are real estate, as shares in the navigation of the river Avon. *Breck-eridge v. Ingram*, 2 Ves. Jr. 652. See p. 15, *ante*, note.

¹ ADVANTAGES OF DOWER ACCORDING TO COMMON RIGHT.—These are two in number, and both are conferred on the widow by reason of the fact that dower according to common right is the law's provision, which, if fairly made, she is bound to accept, and therefore the law will not suffer it to be impaired or destroyed.

1. Dower assigned the widow according to common right is paramount to encumbrances created after the coverture, unless with the wife's concurrence. See § 299, *ante*. For, as stated by Roper (on H. & W. Vol. I., 411): "When dower is assigned as the common law requires, the widow's title shall have such relation to the husband's first and original seisin of the estate, and the period of the marriage, as to defeat not only all charges and encumbrances which he alone made during the coverture, after acquiring the estate, but also all debts which he contracted during the marriage in respect of which such property might be affected, without regard to the circumstances, whether the debts might be owing to a private person or to the crown." But he adds (p.

On the other hand, the following instances of assignment of dower "against common right" are given by Park (on Dower, 262), not being in kind, or not in severalty, when assignment in kind and in severalty is not impracticable: "Thus the heir may, on the acceptance of the widow, assign one manor in lieu of a third part of each of three manors; or he may assign an undivided third part in common [when the husband died sole seised] in lieu of a third part in severalty." And it is added that, with the consent of the widow, the heir may (1) assign her as her dower more or less than one-third of the land of which she is dowable; or (2) may assign her land of the husband in Wales in exclusion of her

412): "But when a different form and rule are adopted by the consent of the widow [*i. e.*, dower against common right], she claims in the nature of a purchaser; so that her estate commences from the assignment, without relation to any antecedent period; for which reason she takes it with all the encumbrances affecting it in the possession of her husband; and it was her own folly to accept of such an assignment." And, see Coke Litt. 32*b*, where it is said: "*Nota*, the endowment by metes and bounds according to the common right is more beneficial to the wife than to be endowed against common right, for there [*i. e.*, when against common right] she shall hold the land charged in respect to a charge made after her title of dower." In accord, see Park on Dower, 242, 267; 1 Bright H. & W. 387, 388; 2 Scribner, Dower, 704; *Jones v. Brewer*, 1 Pick. (Mass.) 314.

2. Dower assigned to the widow according to common right implies a warranty. This is thus explained by Park (on Dower, 275): "Every assignment of dower by the heir, or by the sheriff on recovery against the heir, implies a warranty; but this warranty is special, namely, that the tenant in dower being impleaded by one who has title paramount shall vouch and recover in value not according to that which she has lost, but a third part of the two remaining parts of the land of which she is dowable." And, see Co. Litt. 384*b*; 1 Bright H. & W. 384; 2 Scribner, Dower, 761; *Scott v. Hancock*, (13 Mass.) 162. But it is said, for the reasons given under (1) above as to encumbrances, that this benefit of warranty does not extend to a case where the widow has consented to be endowed against common right. 2 Scribner, Dower, 764; 10 Am. & Eng. Ency. Law, 200; *Jones v. Brewer*, 1 Pick. (Mass.) 314.

dower in the husband's land in England; or (3) may assign in lieu of dower a rent issuing out of the land of which she is dowable. See, further, as to dower "against common right," 10 Am. & Eng. Ency. Law 174; 39 Am. St. Rep. 34; *Chase v. Alley*, 82 Me. 234 (19 Atl. 396); *Skolfield v. Skolfield*, 88 Me. 258 (34 Atl. 27).

§ 319. **Dower in Kind Impracticable.**—It has been seen (§ 318) that dower in kind may be impracticable in two classes of cases, viz.: (1) By reason of the nature of the husband's property, (*e. g.*, a mill or factory), and (2) by reason of the husband's estate in the property (*e. g.*, in co-tenancy). Also the right and mode of endowment in incorporeal hereditaments has been stated (p. 522, *ante*, note). It is now proposed to briefly consider a few special cases in which, for one or the other of the above reasons, dower in kind is, or may be, impracticable.

1. *Dower in a Dwelling-House.*—In this case, though there is no other property subject to dower, it may, nevertheless, in some cases, be practicable to endow the widow substantially in kind, by assigning her particular rooms, with the right to use doors, stairways, and passages, as a means of access; thus making her occupancy and enjoyment equal in value to one-third of the whole house. It has been questioned, however, whether this mode of assignment is according to common right so as to dispense with the widow's consent; but the better opinion is that the widow is bound to accept such assignment, if practicable and fairly made.¹

¹ DOWER IN DWELLING-HOUSE—WIDOW'S CONSENT TO ASSIGNMENT OF ROOMS.—In Perkins' *Profitable Book*, § 406, it is said of the heir's assignment to the widow of a chamber in the capital messuage, where there is no other land of which she is dowable: "But it seemeth that she is not compellable to take the same, because the messuage is, as it were, an entire thing; and it shall be but trouble and vexation unto a woman to have a chamber within the house of another man; and if she will not agree unto the same, then the heir may assign unto her a rent out of the same messuage in the name of dower." Commenting on this, in

Thus in *Simmons v. Lyles*, 27 Grat. (Va.) 922, 931, such an assignment is approved, and it is said by Staples, J.: "There is nothing to show that an assignment of dower in kind is impracticable. We have no information on the subject, except that the property consists of a dwelling-house and lot in the town of Danville. There may be outhouses for aught we know in which the dower may be assigned. The lot itself may be susceptible of division, or, as is not unfrequently done when there is a single edifice, dower may be assigned of so many rooms."

But in a given case there may be no lot attached to the dwelling-house, and no outhouses fit for dower; and the dwelling-house may consist of one or two rooms only, incapable of division between the widow and the heirs.¹ In this case, as impliedly conceded by Judge Staples above, dower in kind is impracticable, and the widow must be otherwise endowed. And he adds (*ubi supra*) (after remanding the case to the lower court for further inquiry as to the property): "If an assignment in kind is found to be impracticable, the court may decree a sale of the whole property, and a moneyed compensation to the appellant in lieu of dower; or it may adopt such other mode of adjustment as will produce the greatest equality with the least inconvenience." And that the court may sell the whole property, see, also, *White v. White*, 16 Grat. 264 (80 Am. Dec. 706); *Wilson v. Branch*, 77 Va. 65 (46 Am. Rep. 709). But when it is thus necessary to sell the property, and to satisfy the claim of dower out of the proceeds, the court cannot, without the consent of all persons concerned, pay the widow a gross sum estimated as the value of her dower, but must securely invest one-third of the pro-

White v. Story, 2 Hill (N. Y.) 543, 548, Bronson, J., says: "In a case like this, where there are no other lands in which the dower may be assigned, I think the widow could not refuse to take a part of the house. But, however that may be, this woman does not complain of having 'a chamber within the house of another man,' and I find nothing in the books to relieve a man from the 'trouble and vexation' which may follow. * * * It is quite

ceeds of the property, and direct the interest on such investment to be paid to the widow during her life. *Blair v. Thompson*, 11 Grat. 441; *Harrison v. Payne*, 32 Grat. 387; *Herbert v. Wren*, 7 Cr. 370. See, also, § 307, *ante*.¹

probable that the division of a dwelling-house may be prejudicial to the interests of both parties; but that cannot be helped without the aid of the legislature." And, see 2 Scribner, Dower, 80, 81.

¹ DOWER IN DWELLING-HOUSE IMPRACTICABLE.—In *Abingdon's Case*, cited in *Howard v. Cardish*, Palmer, 264, the sheriff returned that he had endowed a widow of a dwelling-house by assigning to her in severalty the third part of each chamber, and that he had chalked out for her the part in each. This was held "an ill assignment"; and because (it is presumed) it was considered idle and malicious, the sheriff was committed to prison. See 2 Scribner, Dower, 582; *White v. Story*, 2 Hill (N. Y.) 543, 549.

¹ SALE OF PROPERTY BY A COURT OF CHANCERY, WHEN DOWER IN KIND IS IMPRACTICABLE.—Such power of sale, as is stated in § 319, is affirmed in Virginia in a number of cases; and this, independently of statute, in the exercise of the general powers of a court of equity. But the court cannot decree a sale of the property, without the consent of the widow, merely because dower in kind may prove to be injurious to the interests of the heirs or creditors. The division itself must be impracticable. *Simmons v. Lyles*, 27 Grat. 922, 930.

It is remarkable that this power of sale by a court of equity held in Virginia to exist when dower in kind is impracticable is nowhere alluded to in the old books on dower; nor does Scribner recognize it in his standard treatise. In 3 Pomeroy's Eq. §§ 1383-84, the advantages of the equitable jurisdiction over dower are set forth at length; but a sale because dower in kind is impracticable is not among them. The Virginia cases asserting the power have been doubted in West Virginia. *Hoback v. Miller*, 44 W. Va. 635 (29 S. E. 1014). It is true that in 39 Am. St. Rep., p. 35, note, a power of sale in the absence of statute, is said to exist, without the consent of the widow, when assignment by metes and bounds is found to be impossible; but the cases cited do not sustain the proposition. It is believed that, outside of Virginia, such power of sale, under the general equity jurisdiction, is not recognized; and that, in the absence of statute, or consent, the widow must be endowed of the third part of the issues and profits, or of the third part of the rental value, or in some other special manner

2. *Dower in Mines*.—As to the *right* of dower, the test is whether the mines had been opened in the lifetime of the husband; and as to the *mode* of assignment, this is by metes and bounds if practicable; and if not, by giving the heir and

not involving an absolute sale of the property. See the mode of assigning dower in mills, mines, dwelling-houses, etc. (§§ 318, 319), in which, out of Virginia, there is no suggestion of a sale. See, also, 2 Scribner, Dower, 639; 10 Am. & Eng. Ency. Law, 176, 179.

It is assumed, of course, in what has been said, that the sale is decreed for no other reason than that dower in kind is impracticable. It has no application to a sale to satisfy encumbrances paramount to dower, when the widow is dowable of the surplus only (§ 299, *supra*). But if the encumbrance is subordinate to dower, it is error to decree a sale without first assigning dower in kind, unless, of course, the widow consents to receive a commutation in money. 2 Scribner, Dower, 653; *Williams' Case*, 3 Bland Ch. 186, 264; *Simmons v. Lyles*, 27 Gratt. 922; *Fisher v. Clements*, 82 Va. 813 (1 S. E. 182); *Laidley v. Kline*, 8 W. Va. 218; *Kilbreth v. Roots*, 33 W. Va. 600 (11 S. E. 21); *Jarrell v. French*, 43 W. Va. 456, 27 S. E. 263).

In two cases in West Virginia, an effort has been made by the widow to obtain a decree for the sale of the whole property, and the assignment of her dower out of the proceeds, which, as we have seen, she cannot do by bringing suit for partition. In the first case, *Hull v. Hull*, 26 W. Va. 1 (S. C. 35 W. Va. 155, 29 Am. St. Rep. 800), the widow filed a bill, in the nature of a creditors' bill, for this purpose; but it was held that a widow has no right to bring a suit in chancery to have all the lands of her husband sold, and out of the proceeds of such sale to have the value of her dower paid, and the residue paid to the creditors of her husband (their claims being subordinate to dower), and if any surplus remains to have it divided among her husband's heirs. She had no right, the court said, to file a creditors' bill; and if she had, such sale would not be valid without the consent of the heirs, all being adult, and, perhaps, not even then.

In the second case, *Hoback v. Miller*, 44 W. Va. 635 (29 S. E. 1014), the widow filed her bill solely under her right to dower, making the infant heir defendant; and, alleging that the land was not susceptible of allotment of dower in kind without detriment to the property, she prayed that it be sold, and she be given a gross sum in lieu of dower in kind. The court below decreed

widow alternate occupancy of the whole mine, for short periods proportioned to their interests, or by giving the widow one-third of the profits. And the same rule has been held applicable to quarries. *Stoughton v. Leigh*, 1 Taunt. 402; *Crouch v. Puryear*, 1 Rand. (Va.) 258; *Coates v. Cheever*, 1 Cowen (N. Y.) 460; *Billings v. Taylor*, 10 Pick. (Mass.) 460 (20 Am. Dec. 533); *Hendrix v. McBeth*, 61 Ind. 473 (28 Am. Rep. 680); 2 Scribner, Dower, 591; 10 Am. & Eng. Ency. Law, 158.¹

the sale; but on appeal this was reversed, and the decree was pronounced not merely erroneous, but void. The court doubted the Virginia doctrine (§ 319), that in a suit by the *heir* the land may be sold, without the consent of the widow, if dower in kind be impracticable; and decided emphatically, that a *widow* "has no sort of right to sue and sell forever from the heir the fee-simple that she may get satisfaction for her small estate out of the proceeds," and that this was, *a fortiori*, true when the heir is an infant. The court said: "A widow entitled to dower is entitled by the common law to a part of the realty itself, to be set out by metes and bounds, or a particular room in a house; or, if insusceptible of such assignment, then the third toll-dish in a mill, or occupancy for a third of the time, or a third of the rent. 2 Min. Inst. 159; 2 Scrib. Dower, p. 80, § 16."

¹ DOWER IN MINES.—It is held in *Lenfers v. Henke*, 73 Ill. 405 (24 Am. Rep. 263), by way of extension of the rule laid down in the text above, that, although it was not known in the lifetime of the husband that any mines existed in the land, and they were opened for the first time by the heir, but before assigning the widow dower, that she was dowable therein; and that it would not be waste for her to continue the mining which the heir had begun. And, see this approved in *Priddy v. Griffith*, 150 Ill. 560 (37 N. E. 999; 41 Am. St. Rep. 397). A similar decision was made in *Seager v. McCabe*, 92 Mich. 186 (52 N. W. 299; 16 L. R. A. 247), under a statute which gave to the widow "the use during her natural life of one-third of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage," the court attaching some importance to the language of the statute. But, from the reasoning of the court, it is probable that the decision would have been the same without the statute; and that in Michigan a widow would be held dowable of

3. *Dower in Partnership Real Estate*.—It is the general doctrine in the United States that real estate bought with partnership funds and for partnership purposes, is impressed in equity with the character of personalty; but this is *sub modo* only, and not *out and out* for all purposes. That is to say, such partnership realty is in equity considered personalty so far as it may be needed to pay the partnership debts, and to adjust the accounts of the partners *inter se*; but the surplus remaining after this is done is considered realty, and devolves on the heir, and is subject to the widow's dower. See 1 Scribner, Dower, 163; 2 Id. 575; 10 Am. & Eng. Ency. Law, 159; 3 Pom. Eq. § 1166, note; 27 L. R. A. 340, note; *Martin v. Smith*, 25 W. Va. 579.

When by the above doctrine the widow is entitled to dower in the surplus, it is manifest that her claim must be suspended until the payment of partnership debts, and the adjustment would usually involve the sale of the partnership realty, she would not be entitled to receive her dower in kind, but one-third of the surplus would be invested, and the interest thereon paid the widow during her life. 2 Scribner, Dower, 163, 648, 695.

The rule in England, contrary to that in the United States

mines which at the time of assignment had never been opened at all.

In *Macaulay v. Dismal Swamp Land Co.*, 2 Rob. (Va.) 507, a husband died seised of land incapable of cultivation, and not otherwise productive or valuable than by cutting the timber, and making sale thereof when converted into shingles. This had been done before the husband's death. The court followed the doctrine of *Stoughton v. Leigh*, 1 Taunton, 202, as applicable by analogy, and gave the widow dower, and said: "It is in truth a mine upon the surface, not of minerals incapable of renewal, but of vegetable matter, in a constant course of spontaneous reproduction." But suppose the husband had not "worked the timber" in his lifetime, but the widow was enterprising enough to desire to support herself in this way. Why should she not be allowed to do so, especially in view of the modified doctrine in the United States as to waste. See 16 L. R. A. 247, note.

generally, is that partnership realty is converted into personalty, not *sub modo* only, but out-and-out, and for all purposes. As under this rule the surplus is personalty, and goes to the personal representatives, the widow is not entitled to dower therein. The English rule has been followed in Virginia, and dower denied in the surplus. See *Pierce v. Trigg*, 10 Leigh, 406; *Wheatley v. Calhoun*, 12 Leigh, 264 (37 Am. Dec. 654); *Parrish v. Parrish*, 88 Va. 529 (14 S. E. 325); *Deering v. Kerfoot*, 89 Va. 491 (16 S. E. 671). But see language of Moncure, J., in *Davis v. Christian*, 15 Grat. 11, 35, commented on in 4 Va. Law Reg. 310; and *Hancock v. Talley* (Va. Special Court of Appeals, 1881); reported in 7 Va. Law Reg. 24, with note.

§ 320. **Dower When the Husband Dies Seised of Several Tracts of Land, Which Descend to the Heir.**—In this case the question arises (supposing that all of three tracts are of equal value), whether the heir can compel the widow to accept as her dower, or the widow demand that the heir assign her, the whole of one of the tracts, instead of one-third of each of the tracts. On this point, the weight of authority at common law is that the assignment of one whole tract is against common right, and is not good unless both heir and widow agree thereto; and that, by common right, the widow is entitled to have set off to her, *per metas et bundas*, the third part of each tract in severalty. Park on Dower, 255, 257; 2 Scribner, Dower, 587; 2 Am. & Eng. Ency. Law, 183; *Scott v. Scott*, 1 Bay (S. S. 504 (1 Am. Dec. 625); *Jones v. Brewer*, 1 Pick. (Mass. 314); *Schnebly v. Schnebly*, 26 Ill. 116; *Wood v. Lee*, 5 T. B. Mon. (Ky.) 50; *Skolfield v. Skolfield*, 88 Me. 258 (34 Atl. 27); *Compton v. Pruitts*, 88 Ind. 171.

The above rule, however, though correct on a strict construction of the word “practicable,” as the test of dower according to common right, may cause serious inconvenience in some cases; and it has not met with the approval of all

the text-writers, as is shown in the note below.¹ It has also been denied in some of the cases, so far as applied to lands which descend to the heir. See *Milton v. Milton*, 14 Fla.

¹ DOWER IN WHOLE OF ONE TRACT INSTEAD OF IN PART OF SEVERAL.—It has been seen in § 318, *ante*, that this case is put by Park as against common right, and requiring the widow's acceptance. But in *Roper, Husband and Wife*, 394, it appears from the text that there has been some difference of opinion on this point; and the editor, Mr. Jacob, expresses the opinion that "perhaps the authorities in favor of this mode of assigning dower [*i. e.*, in one tract for all] would now prevail, if the manor assigned were equal in value to one-third of the whole. It does not seem necessary in all cases that the widow should have a third of each of the husband's estates."

In 1 *Bright, Husband and Wife*, 384, this case is put to exemplify the implied warranty in favor of a widow who has been evicted of her dower by title paramount: "If a husband be lawfully seised of two acres, and of a third by his disseisin before his marriage, and dies, and the widow be endowed of the acre which he held by disseisin, and then the disseisee recovers from her that acre, she will be entitled to be endowed *de novo* of the third part of the two remaining acres," etc. And, yet it is well settled (see p. 523, note) that such warranty only applies when the endowment was according to common right, which would indicate that *Bright* so regards the endowment in this case.

As to the mode of assignment in the case under consideration, it is said in 2 *Tuck. Com.* 65: "Thus if there be three houses, it would not be right to divide each, and give the widow one-third in each, for that would be to embarrass the use of all three to all entitled; but some recompence is to be made [*i. e.*, when one house is assigned the widow], either by a sum of money or rent, for owelty of partition, so as to equalize the value [*i. e.*, when the houses are of unequal value]. With us [in Virginia] the same course is usually pursued as to several tracts of land; and indeed the whole business of assigning dower and making partition is governed by the great principle of so adjusting the several claims as to produce the greatest equality with the least inconvenience." And Professor Minor (2 *Min. Ins.* 103), after laying down the law of England, that "the sheriff must assign not only one-third of *each tract*, but a third of *each species* of land, arable, meadow, pasture, wood, etc. [*sed quare* as to "*each species*" by the modern law. 2 *Scribner, Dower*, 587], declares that in Virginia "one-

369; *Anderson v. Henderson*, 5 W. Va. 182; *Cazier v. Hinchey*, 143 Mo. 203 (44 S. W. 1052). And in a number of the States it has been changed by statute. See 2 Scribner, Dower, 589; 10 Am. & Eng. Ency. Law, 184; *Montgomery v. Horn*, 46 Ia. 285; *Rowand v. Carroll*, 81 Ill. 224; *Richmond v. Harris*, 19 Ky. Law, 1443 (43 S. W. 703). But as to alienees of different tracts of land, sold by the husband without the wife's concurrence, it is universally held that dower in kind must be assigned the widow out of each separate tract, and the burden cannot be thrown on one alienee to the exoneration of the other or others. And the same rule has been retained as applicable to *devisees* of the husband, even where as to the heirs the strict rule of the common law has been changed by statute or judicial decisions. Thus the Kentucky statute, changing the law as formerly held in that State as to heirs, enacts: "Where the lands are *not held by several devisees or purchasers*, it shall not be necessary to assign dower out of each separate portion, but an equitable

third *in value* is to be assigned, in such manner as shall best subserve the mutual convenience of the parties." But no decision on this point has been found in Virginia.

The inconvenience of giving the widow one-third of each tract (which might well cause such endowment to be deemed *impracticable*, at least by a court of equity) is well put by Day, C. J., in *Montgomery v. Horn*, 46 Iowa, 285, 286: "It is conceded that the deceased owned fifteen separate tracts of land. Suppose these separate parcels, to consist of forty-acre tracts, of equal value. Then, instead of being permitted to take five of these forties, the widow must take thirteen and one-third acres out of each of the fifteen. It is apparent that this would very much depreciate the value of the whole property, and that the division could ordinarily be effected only by selling the whole."

It may be added that the simple case of "three tracts of *equal value*" would seldom occur in practice; and that resort should be had to a court of equity, so as to equalize the value "either by a sum of money or rent, for owelty of partition," as Judge Tucker suggests in the quotation above. See as to "owelty," p. 182, *ante*, note; *Clarendon v. Hornby*, 1 P. Wms. 446; *Hyhart v. Jones*, 130 N. C. 227 (41 S. E. 292); 21 Am. & Eng. Ency. Law, 1179.

allotment may be made in one or more parcels in lieu of the whole. See *Richmond v. Harris*, 19 Ky. Law, 1443 (43 S. W. 703). Also, 2 Scribner, Dower, 589; 10 Am. & Eng. Ency. Law, 184, and note; *Coalter v. Holland*, 2 Harring. (Del.) 330; *Droste v. Hall* (N. J. Eq.) 29 Atl. 437).

Another question as to dower according to common right arises when the husband has conveyed, without the wife's concurrence, land to an alienee during the coverture, but dies seised of land sufficient to satisfy the widow's dower right in both the land sold and the land retained. In this case it is held, without the aid of statute, that to avoid the necessity of a suit by the alienee against the heir upon the husband's warranty, dower shall be assigned the widow entirely out of the lands of which her husband died seised. This at least is the rule in equity. See 2 Scribner, Dower, 637; 10 Am. & Eng. Ency. Law, 183; *Wood v. Keys*, 6 Paige (N. Y.) 478; *Lawson v. Morton*, 6 Dana (Ky.) 471; *Richmond v. Harris*, 19 Ky. Law, 1443 (43 S. W. 703); *Stimson v. Thorn*, 25 Grat. 278.

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